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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

NO. 510

ANTHONY GIANFRANCESCO, *Petitioner*,

v.

STATE OF OHIO, *Respondent*

PETITION FOR WRIT OF CERTIORARI

TO

SUPREME COURT OF OHIO

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

NO.....

ANTHONY GIANFRANCESCO, *Petitioner*

vs.

STATE OF OHIO, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO SUPREME COURT OF OHIO

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Ohio entered on the 18th day of March, 1964, motion for a rehearing being denied on April 22, 1964.

CITATIONS TO OPINIONS BELOW

The trial court, Mahoning County, Ohio, issued no written opinion. The decision of the Court of Appeals Seventh Judicial District, State of Ohio, is unreported, but the Appellate Court did issue a written opinion (Appendix A, page 13). The decision of the Supreme Court of Ohio is unreported. The Supreme Court journalized their entries dismissing the appeal for the reason that no substantial constitutional question exists and overruling the motion for leave to appeal (Appendix A, pages 18-19).

JURISDICTION

The judgment of the Supreme Court of the State of Ohio, was entered on March 18, 1964, (Appendix A, pages 18-19) a timely motion for rehearing was denied on April 22, 1964, (Appendix A, page 20). An application for an extension of time in which to file a Petition for Writ of Certiorari was granted by the Honorable Potter Stewart, Associate Justice

of the Supreme Court of the United States extending the time in which to file said Petition for Writ of Certiorari to September 19, 1964.

The jurisdiction of this court is invoked under the provisions of 28 U. S. C. 1257 (3), since the constitutional rights of the Petitioner as protected by the Fourth and Fourteenth amendments of the Constitution of the United States have been violated.

QUESTIONS PRESENTED

(1) Whether the trial court violated the constitutional rights of the Petitioner, as protected by the IV and XIV Amendments of the Constitution of the United States, by failing to sustain a motion to suppress certain evidence, introduced by the State of Ohio, which had been obtained as a result of an unlawful arrest of Petitioner without a warrant and a search of Petitioner's car without a warrant at the time of said unlawful arrest.

(2) Whether the trial court violated the constitutional rights of the Petitioner as protected by the XIV Amendment of the Constitution of the United States by making a statement to the jury, in open court after the jury had been deliberating several hours, limiting the time in which the jury had to deliberate and reach their verdict, thereby coercing the jury to act.

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

AMENDMENT XIV

Section I

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

On August 17, 1962, at approximately 3:45 P.M., the Petitioner was seated in a 1957 Buick automobile in the parking lot adjacent to the Atlantic Mills Department Store on Belmont Avenue in the City of Youngstown, Ohio, (Appendix B, page 22.) Petitioner had just purchased a bathing suit at said store (Appendix B, page 28).

The Petitioner was first seen by Youngstown City police officers Robert R. Zins and Francis J. Gallagher; Patrolman Zins was a "rookie" patrolman, having been appointed to the Youngstown Police Department on the 18th day of September, 1961, and the major portion of his eleven months' experience as a policeman had been as a "beat" policeman in the Blue Division, during which period he had never made an arrest for a "numbers" or "bug" violation, and he had very little experience of any type in police work (Appendix B, pages 23-24).

At such time neither Patrolman Zins, nor his companion, Patrolman Gallagher, had a warrant for the arrest of this defendant, nor were they in the course of any investigation of this defendant (Appendix B, pages 24, 25, 30).

When Officers Zins and Gallagher first saw the Petitioner, he was seated in a parked automobile with the windows down; he was seated quietly; there was nothing unusual about his

appearance or activity indicating that he was engaged in any violation of law, nor did they have any reason to suspect that this Petitioner was engaged in such violation (Appendix B, pages 25-27, 30).

This Petitioner is not known to the police as a violent or desperate character, or one who would cause a police officer any threat or fear of harm or violence (Appendix B, pages 27, 33).

Upon sighting Petitioner, Officer Zins stated to Officer Gallagher, "Let's go and shake Booze up." ("Booze" being a nickname by which this defendant has been known since childhood.) (Appendix B, page 31).

Patrolman Zins further testified that he did not know whether Petitioner had anything at all to do with the slips found in the car. Both Patrolman Zins and Patrolman Gallagher testified that they had never seen the Petitioner writing a number slip, had never seen him sell a number slip, had never seen him receive any money in connection with the sale or exchange of number slips (Appendix B, page 29).

The record reveals further that Patrolman Zins approached and searched by visual examination and inspection the interior of the car, and that he was in and around the interior of the automobile for some four or five minutes before placing this defendant under arrest (Appendix B, page 34).

Officer Thomas Kelty, of the Vice Squad, Police Department of the City of Youngstown, Ohio, testified that this defendant was not a "backer" of the numbers game, and that the only "backers" known to him, as an "expert" and "authority" were George Economus, Frank Tarentino, the Naples Brothers, and one John Burnich (Appendix B, page 36).

Officer Kelty further testified that he had never seen this defendant writing a number slip, had never seen him sell a number slip, nor had he ever seen him receive any money in connection ith the sale or exchange of number slips (Appendix B, page 36).

The State of Ohio placed only three (3) witnesses on the stand. The entire case was based on the testimony of Officers Zins and Gallagher who made the arrest, and five (5) exhibits, (Appendix B, page 40) obtained at the time of said arrest. The trial court allowed the five (5) exhibits in evidence over objection. Officer Kelly was not involved in the arrest or search of Petitioner's car but testified as an expert on behalf of the State of Ohio. Without the five (5) exhibits the State of Ohio could not prove a case.

At the close of all the evidence and the trial court's charge, the jury retired to deliberate. At approximately 2:30 in the afternoon the jury requested the court for further instructions which the trial court granted. An hour later at 3:30 p.m., the jury was called into the court room and the trial court advised the jury, "You will have to stay until you reach a verdict." And then, in substance, advised the jury to go out and try for another half an hour and then report to the court (Appendix B, page 39). At the time the trial court made this statement to the jury, the foreman, at the court's request, advised the court, "We are closer to a verdict, but I don't know whether we will ever reach one, to tell the truth." (Appendix B, page 40).

At the time that this statement was made by the trial court to the jury, the jury had been deliberating several hours, and within a half hour after this statement was made by the trial court the jury returned a verdict of "Guilty" against the Petitioner.

MANNER IN WHICH FEDERAL QUESTION WAS PRESENTED

A motion to suppress the evidence obtained as a result of the unlawful arrest without a warrant and the search of Petitioner's car without a warrant was filed on the 10th day of December, 1962 (Appendix C, page 42). During the trial of said case counsel on behalf of Petitioner objected to the admission of the exhibits obtained as a result of said

arrest and search for the reasons that it violated the Petitioner's constitutional rights (Appendix B, pages 38, 39). The trial court allowed the exhibits into evidence over said motion and objections.

The question concerning the statement of the trial court to the jury, which coerced the jury to act, (Appendix B, page 39) was raised by assignments of error and brief on appeal to the Court of Appeals, Seventh Judicial District, State of Ohio and the Supreme Court of the State of Ohio, for the reason that the constitutional rights of the Petitioner to a fair and impartial trial had been violated.

REASONS FOR GRANTING THE WRIT

POINT 1: THE UNLAWFUL ARREST AND UNLAWFUL SEARCH OF PETITIONER'S CAR

A Motion to Suppress Evidence is the bulwark against all transgressions of constitutional rights and is a veritable barrier against improper police conduct.

The great judicial concern and growing awareness of the necessity of preserving our basic constitutional guarantees against unreasonable search and seizure prohibited by the provisions of the Fourth and Fourteenth Amendments of the Federal Constitution is demonstrated by the powerful language contained in syllabi 3 and 4 of *Mapp vs. State of Ohio*, 367 U.S., 643; 6 L. Ed (2d) 1081 81 Sup. Ct. 1684 (1961) as follows:

> Syl. 3: "All evidence obtained by searches and seizures in violation of the Fourth Amendment to the Federal Constitution is, by virtue of the due process clause of the Fourteenth Amendment guaranteeing the right to privacy free from unreasonable state intrusion, inadmissible in a state court."
>
> Syl. 4: "The Fourth Amendment's right of privacy is enforceable against the states through the due process clause of the Fourteenth Amendment."

The historical justification and consideration necessary of such stringent approach in the prosecution of criminal cases is set forth in syllabus 8 of the Mapp case as follows:

> "However much in a particular case insistence upon observance by law officers of traditional fair procedural requirements may appear as a technicality that inures to the benefit of a guilty person, the history of the criminal law proves that tolerance of short-cut methods in law enforcement impairs its enduring effectiveness."

The Mapp case, supra, has revolutionized the entire concept of the "EXCLUSIONARY RULE" and in substance has held that any evidence obtained by search and seizure in violation of the Fourth Amendment of the Constitution of the United States is inadmissible in a state court as well as in a federal court.

Since the decision in Mapp vs. State of Ohio, supra, on this subject the Supreme Court of the United States on January 14, 1963, in the case of *Wong Sun and James Wah Toy vs. United States*, 371 U.S. 471, Volume 9, L. Ed. 2, 441, 83 S. Ct. 407 again passed on this question:

> Syl. 3: "An arrest with or without a warrant must stand upon firmer ground than mere suspicion, though the arresting officer need not have in hand evidence which would suffice to convict; the quantum of information which constitutes probable c a u s e — evidence which would warrant a man of reasonable caution in the belief that a fellony has been committed — must be measured by the facts of the particular case."
>
> Syl. 4: "ABUSE OF POWER — PROBABLE CAUSE. "The history of the use, and not infrequent abuse, of the power to arrest, cautions that a relaxation of the fundamental requirements of probable cause would leave law-abiding citizens at the mercy of the officers' whim or caprice."

Syl. 10: "A vague suspicion cannot be transformed into probable cause for arrest by reason of the suspect's ambiguous conduct which the arresting officers themselves have provoked."

Syl. 11: "SEARCH AND SEIZURE — VALIDATION BY RESULT.

"A search unlawful at its inception is not validated by what it turns up."

Syl. 12: "EVIDENCE — WRONGFULLY OBTAINED — ADMISSIBILITY.

"Evidence seized during an unlawful search cannot constitute proof against the victim of the search; the exclusionary prohibition extends as well to the indirect as the direct products of such invasion."

In the case of *John Patrick Henry vs. United States*, 361 U.S. 98,, 4 L. Ed. (2d) 134, 80 Sup. Ct. 168, FBI agents were investigating the theft of interstate shipment of whiskey and had received certain information from Defendant's employer concerning Defendant's implications with such interstate shipments. FBI agents had observed Defendant placing cartons in his car, but were unable to determine the size, number, or contents of the cartons, and later the agents stopped the Defendant's car and the Defendant was heard to say, "It's the G's" and the agents then searched the car and seized the cartons found therein. Later it was learned that the cartons contained stolen radios, whereupon Defendant was placed under formal arrest. The Supreme Court of the United States held that the agents had no probable cause at the time they stopped the car to believe that the Defendant was violating or had violated the law.

The following syllabi of the Henry case are directly in point in the present case:

Syl. 7: "While a search without a warrant is, within limits, permissible if incident to a lawful arrest, if an arrest without a warrant is to support an incidental search it must be made with probable cause."

Syl. 11: "In determining probable cause justifying an arrest without warrant, the fact that contraband was afterwards discovered is not sufficient, since an arrest is not justified by what the subsequent search discloses."

Syl. 13: "Under the Fourth Amendment suspicion is not enough for an officer to arrest a citizen without warrant."

Syl. 14: "The Fourth Amendment teaches that it is better that the guilty sometimes go free than that citizens be subject to easy arrest."

Syl. 15: "The fact that suspects are in an automobile is not enough to justify a search of the automobile without warrant."

See also the following cases concerning the existence of probable cause for the making of an arrest without an arrest warrant and a search made in conjunction with said arrest without a search warrant. These cases hold that the search was illegally made and the evidence should be suppressed.

United States v. Di Re, 332 U.S. 581, 92 L. Ed. 210, 68 Sup. Ct. 222;
Johnson v. United States, 333 U.S. 10, 92 L. Ed. 436, 68 Sup. Ct. 367;
Miller v. United States, 357 U.S. 301, 2 L. Ed. (2d) 1332, 78 S. Ct. 1190;
Cervantes v. United States, 263 Fed. (2d) 800;
United States v Irwin, 86 F. Supp. 362;
United States v. Allen, 16 F. (2d) 320;
People v. Jordan, 37 Misc. (2d) 33, 234 N.Y.S. (2d) 323;
State v. Valentin, 74 N.J. Super. 502, 181 A (2d) 551;
State of Ohio v. Rogers, 198 NE (2d) 796.

The State's case against the Petitioner was based entirely upon evidence obtained as a result of the unlawful arrest and the unlawful search, both being made without warrant. From the facts as set out by the excerpts of the record taken

at the time of the trial of the case (Appendix B, pages 21-41) and the law as above set out, it is urged that the motion filed by the Petitioner to suppress the evidence and the objections made to the admission of such evidence should have been sustained for the following reasons:

1. That the search was prior to and not as an incident of arrest.

2. That the police officers had no justification or probable cause for arresting the Petitioner.

3. That the search of Petitioner's car, whether prior to or subsequent to an arrest, was without authority of law and in direct violation of the Petitioner's constitutional rights.

POINT 2: TRIAL COURT'S COERCIVE STATEMENT TO THE JURY

At page 142 of the record (Appendix B, page 39) the Trial Court made a statement to the jury, when they indicated that they were deadlocked, to the effect that they would have to stay until a verdict was reached.

Counsel for the Petitioner feels that this ill-considered action by the Trial Court, coming as it did after long hours of deliberation and at the end of a long and exhausting day for all concerned, in effect, constituted a directive or mandate by the Court to return a verdict within the time prescribed; that it had a coercive and intimidating effect on what the record reveals to be a sharply divided panel of jurors, and threatened them with prolonged confinement unless a judgment and verdict was returned. The words positively and unequivocally stated by the Court were: "You will have to stay until you reach a verdict." There was no limitation as to time placed on the Court's statement. The rule of reasonableness with respect to the deliberation or consideration by a divided panel was entirely discarded and the effect of this sharply worded directive cannot be over-emphasized.

Counsel for this Petitioner strongly contends that this statement standing alone constitutes irregularity of such magnitude that to sustain a verdict of guilty following such a statement would be a denial of due process, and a denial of the Petitioner's right to a fair and impartial trial.

In the case of *Boyett v. United States*, 48 F (2d) 482, Syllabus 10 states:

> "Remarks of court on jury's return for additional instructions *held* erroneous as tending to deprive defendant of fair trial.
>
> "Court remarked, at time jury returned for additional instructions, that it did not seem that there should be any great difficulty in arriving at a verdict, and instructed the marshall to prepare supper for jury and a place for them for the night and let them consider verdict after supper and until bedtime, and then permit them to retire until morning and after breakfast to return to jury room for further consideration of verdict."

A short time after this statement was made the jury returned with a verdict of guilty.

The Court concluded that the Judge's charges and remarks tended to deprive the defendant of a fair and impartial trial and required a reversal of the finding of guilty.

In the body of the opinion at page 484 the Court states as follows:

> "A federal judge is vested with considerable discretion in commenting on the facts before the jury and in reviewing the evidence, provided he does so fairly and presents both sides of the case, and also makes it clear to the jury that they are the sole ultimate judges of the facts, of the credibility of the witnesses, and of the weight and sufficiency of the evidence. However, when it is apparent that doubt exists in the minds of the jury, after having received the charge of the court and retired to deliberate, in delivering additional charges the judge

should exercise caution and refrain from indicating to the jury his own opinion as to the guilt or innocence of the defendant. It is also his duty to refrain from any intimidation or coercion of the jury. Kesley v. U.S. (C. C. A., 5th Circuit) 47 F. (2d) 453, decided March 5, 1931; Garst v. U.S. (C. C. A.) 180 F. 39; Oppenheim v. U.S. (C. C. A.) 241 F 625; Lewis v. U.S. (C. C. A.) 8 F. (2d) 849."

See also *People v. Josey*, (1963) 19 App. Div. (2d) 660, 241 N.Y.S. (2d) 620 in which a judgment of conviction was reversed although said conviction was warranted by the evidence where it was found that the trial judge's remarks and instructions to the jury when they reported failure to agree were coercive. See also *People v. Crowley*, (1950) 101 Cal. App. (2d) 71, 224 P. (2d) 748.

CONCLUSION

It is respectfully urged that the constitutional rights of the Petitioner as protected by the IV and XIV Amendments of the Constitution of the United States have been violated and that this Petition for Writ of Certiorari should be granted.

Edward L. Williams
W. Glenn Osborne

EDWARD L. WILLIAMS
W. GLENN OSBORNE
Counsel for Petitioner
1101-3 Union National Bank Bldg.
Youngstown, Ohio

Acknowledged Receipt of a
Copy of Foregoing Petition for
Writ of Certiorari this

.....day of ....., 1964

.....

Prosecuting Attorney
Mahoning County, Ohio

APPENDIX A

"STATE OF OHIO, MAHONING COUNTY"

"IN THE COURT OF APPEALS"
"SEVENTH DISTRICT"

"STATE OF OHIO,
PLAINTIFF-APPELLEE,
vs.
ANTHONY GIANFRANCESCO,
DEFENDANT-APPELLANT."

"OPINION"
"Case No. 4316"

"APPEARANCES"

"Clyde W. Osborne, Prosecuting Attorney, and Loren H. Van Brocklin, Assistant Prosecuting Attorney, Youngstown, Ohio, for Plaintiff-Appellee."

"Edward L. Williams and Jack W. Nybell, Youngstown, Ohio, for Defendant-Appellant."

"Hon. Paul W. Brown,
Hon. James G. France,
Hon. George M. Jones, JJ."

"Dated: October 15, 1963"

"Grace Marten,
Court of Appeals Reporter,
Mahoning County Courthouse,
Youngstown, Ohio"

"JONES, J."

"Anthony Gianfrancesco was indicted by the Mahoning County, Ohio, Grand Jury, May Term 1962. He was charged with a violation of Revised Code Section 2915.13.

"On the tenth day of December, 1962, counsel for Gianfrancesco filed a motion to suppress evidence, which was subsequently overruled by the trial court. The case went to trial and a jury on the fourteenth day of February, 1963, returned a verdict of guilty as charged in the indictment.

"Subsequent to the trial defedant filed a motion for new trial and an application for probation. Both motion and application were overruled by the trial court, and Gianfrancesco was sentenced to a term of not less than one nor more than ten years in the State Penitentiary.

"The matter is now before this court on an appeal from the judgment of the Court of Common Pleas of Mahoning County, Ohio.

"On the seventeenth day of August, 1962, at about 3:45 p.m. Gianfrancesco was seated in a 1957 Buick automobile in a parking lot adjacent to the Atlantic Mills Department Store on Belmont Avenue in the City of Youngstown, Ohio. At this time a police officer of the city of Youngstown approached the vehicle in which Gianfrancesco was seated. The officer requested that Gianfrancesco hand to him certain pieces of paper that were lying on the front seat of the automobile. The paper slips were number tickets. Gianfrancesco was then placed under arrest, and a search was made of the automobile. Numbers slips were found lying on the front seat, underneath the front floor mat, and tucked between the crack of the front seat of the automobile. Gianfrancesco was then taken by the officer to the Youngstown Police Department, where an affidavit and warrant for arrest were immediately obtained.

"The first assignment of error charges that the trial court erred in overruling Gianfrancesco's motion to suppress evidence. This evidence, of course, was the slips and tally sheets obtained as the result of the search conducted in the Buick automobile at the parking lot.

"Section 2915.13, Revised Code, states as follows:—

" 'No person shall establish, open, set on foot, carry on, promote, make, draw, or act as 'backer' or 'vendor' for or on account of a scheme of chance known as 'policy,' 'numbers game,' 'clearing house,' or by words or terms of similar import, located in or to be drawn,

paid, or carried on within or without this state, or by any of such means sell or expose for sale anything of value.

" 'Whoever violates this section shall be fined not less than five hundred nor more than one thousand dollars and imprisoned not less than one nor more than ten years.' "

"It has been held that where the violation of a criminal statute carries a penalty of a substantial fine and imprisonment for a period of one or more years and the person convicted under the statute is sentenced to the penitentiary, his offense is classed as a felony. Ex parte Thorpe, 66 Ohio App., 128, 32 N. E. (2nd), 571, affirmed, 137 Ohio St., 325, 30 N. E. (2d) 335.

"Section 1.06, Revised Code, states as follows:—

"Offenses which may be punished by death or by imprisonment in the penitentiary are felonies; all other offenses are misdemeanors. As used in the Revised Code 'minor offense' is synonymous with misdemeanor'."

"The Youngstown police officer had good reason to believe that Gianfrancesco was regularly engaged in carrying on a scheme of chance involving numbers tickets. The defendant was arrested, without a warrant, for what the arresting officer believed and had probable cause to believe was a commission of a felony. Section 2935.04, Revised Code, describes when an arrest may be made without a warrant, and reads as follows:—

" 'When a felony has been committed, or there is a reasonable ground to believe that a felony has been committed, any person without a warrant may arrest another whom he has reasonable cause to believe is guilty of the offense, and detain him until a warrant can be obtained."

"From the evidence it appears without question that the officer had probable cause for making the arrest.

"The United States Supreme Court in the case of Henry v. United States, 361 U. S., 98, 102, 4 L. Ed. (2d), 134, 80 S. Ct., 168, said:—

> " 'Probable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed'."

"A question of fact is presented in each case, and when the facts within the knowledge of the police officer are sufficient to cause a reasonable and prudent man to believe that a felony has been committeed and that the accused has committed it, probable cause is present. State of Ohio v. Beck, 175 Ohio St. 73.

"A police officer is authorized, without a warrant, to arrest a person found to be in violation of the law, although such police officer has no such previous knowledge of the fact, if such police officer acts bona fide and upon such information as induces an honest belief that the person arrested is in the act of violating the law. See Porello v. State of Ohio, 121 Ohio St. 280.

"The remaining question, as respects this assignment of error, is then: Should the evidence obtained following the lawful arrest be suppressed as being "unlawfully obtained?" We think not. Once again we turn to the Beck case where the court held that:—

> " 'All searches and seizures without warrants are not prohibited by law. The search of an individual's person on the honest belief of an arresting officer, based upon probable cause that a felony has been committed, does not constitute an unlawful search, and incriminating articles seized during the search may properly be received in evidence against the individual at his trial for having in his possession such articles.' State v. Beck, 175 Ohio St. 73, syllabus 1."

"Coming now to the fifth assignment of error that the trial court erred in its supplement charge to the jury. We

are of the opinion that the giving to the jury of the definition of the word "promoting" was discretionary upon the trial court, and find no abuse thereof.

"For the final assignment of error appellant argues that the court called the jury into the courtroom during the course of their deliberations to determine whether or not there was a reasonable chance of soon reaching a verdict. The trial court said:—

" 'The Court: You are hard-working jurors.

"You will have to stay until you reach a verdict. So then I would ask you whether there is a reasonable chance of reaching a verdict. Who is your foreman?

"Jury Foreman: I am, Your Honor.

"The Court: What do you say?

"Jury Foreman: I wish I knew.

"The Court: Give you another half hour?

"Jury Foreman: We are closer to a verdict, but I don't know whether we will ever reach one, to tell you the truth.

"The Court: Well, why don't you go and try for another half hour and let the court know by the buzzer when you are ready and we will reconsider this matter at that time. All right. Thank you'."

"It is this language that appellant claims to be objectionable and prejudicial. We are unable to conclude that this language has such an obvious meaning one way or the other as to be objectionable.

"As to the other errors assigned we find nothing contained therein to the prejudice of this defendant.

"We are, therefore, of the opinion that the evidence properly justified the finding that Gianfrancesco was guilty as charged.

"The judgment of the Court of Common Pleas is hereby affirmed."

"Brown, P. J., Concurs.

France, J., Concurs.

"APPROVED:"

"GEORGE M. JONES," "*JUDGE*"

APPENDIX A

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,
City of Columbus.

State of Ohio,
Plaintiff-Appellee,
vs.
Anthony Gianfrancesco,
Defendant-Appellant.

To wit: Wednesday, March 18, 1964

1964 TERM
No. 38519
APPEAL FROM THE
COURT OF
APPEALS
For MAHONING
County

This cause, here on appeal as of right from the Court of Appeals for Mahoning County was heard in the manner prescribed by law and upon motion of the appellee to dismiss such appeal.

On consideration thereof, such appeal is dismissed for the reason that no substantial constitutional question exists herein.

It is further ordered that the appellee recover from the appellant its costs herein expended; that a mandate be sent to the Court of Common Pleas to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Mahoning County for entry.

I, THOMAS L. STARTZMAN, Clerk of the Supreme Court of Ohio certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court

this.....day of ..... 19.....

.....Clerk

.....Deputy

APPENDIX A

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO
City of Columbus
State of Ohio,

Plaintiff-Appellee

vs.

Anthony Gianfrancesco,

Defendant-Appellant

TO WIT: Wednesday, March 18, 1964

1964 TERM
No. 38519
MOTION FOR LEAVE TO APPEAL FROM THE COURT OF APPEALS FOR MAHONING COUNTY

It is ordered by the Court that this motion is overruled.

COSTS:

Motion Fee, $20.00, paid by Anthony Gianfrancesco.

I, THOMAS L. STARTZMAN, Clerk of the Supreme Court of Ohio, certify that the foreging entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court

this.....day of....., 19.....

....., Clerk

....., Deputy

APPENDIX A

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,
City of Columbus.
State of Ohio,
Plaintiff-Appellee,
vs.
Anthony Gianfrancesco,
Defendant-Appellant.

1964 TERM
April 22, 1964
No. 38519
REHEARING

It is ordered by the Court that rehearing in this case is denied

I, THOMAS L. STARTZMAN, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No..... Page.....

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court

this.....day of..... 19.....

.....Clerk

By.....Deputy

APPENDIX B

STATE OF OHIO, MAHONING COUNTY	ss.	DEFENDANT'S BILL OF EXCEPTIONS

IN THE COURT OF COMMON PLEAS

CASE NUMBER 21776

STATE OF OHIO,
Plaintiff

vs.

ANTHONY GIANFRANCESCO,
Defendant.

APPEARANCES:

ATTYS. EDWARD L. WILLIAMS and
JACK NYBELL,
On Behalf of the Defendant

ATTYS. LOREN E. VAN BROCKLIN and
CARROLL E. MATTER,
On Behalf of the State

DIRECT EXAMINATION OF OFFICER ROBERT R. ZINS

By Mr. Van Brocklin

Record — page 13 — 14 line 12

"Q Will you please state your name and address?"
"A Robert R. Zins, 417 Rhoda."
"Q Where are you employed, sir?"
"A Youngstown Police Department."
"Q And in what capacity are you employed?"
"A I am a patrolman on the Blue Division presently."
"Q I now direct your attention to August 17, 1962, and I now ask you what division of the police department you were assigned to on that day?"
"A I was with the Intelligence & Security Squad, Youngstown Police Department."
"Q I further ask you whether or not you were acting at that time as a plain-clothes man?"
"A Yes, I was."
"Q I further ask you whether or not you and another officer were operating Car Number 58 on that date?"
"A That is correct."
"Q Who was that other officer?"

Record — Page 14.

"A Francis Gallagher."
"Q On August 17, 1962, here in the State of Ohio, County of Mahoning, and the city of Youngstown, I now ask you whether or not about 3:45 p.m. on that afternoon you approached the Atlantic Mills parking lot up here on Belmont Avenue?"
"A That is correct, sir."
"Q When you approached that parking lot and you drove in what did you see, if anything?"
"A I saw Mr. Gianfrancesco's car parked about two aisles up from us from where we pulled in."
"Q Were you acquainted with Gianfrancesco?"
"A Yes, I was."

"CROSS EXAMINATION:" (Officer Robert R. Zins)

"By Mr. Nybeil."

Record — Page 23

"Q Officer Zins, when were you appointed to the Youngstown Police Department?"

"A September 18, 1961."

"Q So that in August of 1962 you had been a police officer for less than one year, is that correct?"

"A That is correct."

"Q I don't want to embarrass you, Officer, but what was the nature of your experience, what did you do before you were a policeman?"

"A I had just finished up college."

"Q And you didn't study criminology in college, did you?"

"A I had one course in criminology."

"Q Did your course in criminology embrace any study of what does or does not constitute a number or policy slip?"

"A No, it did not. It covered vice work, but it didn't cover that portion."

"Q So that you didn't acquire your familiarity and understanding of what is or is not a number slip while you were in college, is that correct?"

"A That is correct."

"Q After your appointment in September of 1961 were you in the Blue Division for awhile?"

"A That is correct. Until approximately January the 15th of '62."

"Q So that you were in blue for about six months?"

"A That is correct."

"Q During the three months you were in blue did you make any vice arrests, any numbers arrests?"

"A No numbers arrests, no."

"Q You were assigned to a beat, were you?"

"A I was on a beat, but no particular one."

"Q Just roving assignment?"

Record—Page 25

"A That is correct."

"Q And you were undergoing, I suppose, that training that any beginning policeman undergoes, is that right?"

"A On-the-job training, yes."

"Q On-the-job training?"

"A Yes."

"Q No special courses or study groups?"

"A Not up to that time, no."

"Q Now, then, you were assigned to the Vice or Intelligence Squad when?"

"A Around the 15th of January, '62."

"Q And are you on the Vice or Intelligence Squad now?"

"A No, I am not."

"Q You are back in blue?"

"A That is correct."

"Q And your rank is patrolman?"

"A That is correct."

"Q So it is a fair statement, Officer, isn't it, that you haven't had too much experience in police work, is that right?"

"A I suppose you could say that."

"Q And there is nothing wrong with it. Everybody has to start some place."

"A That is right."

"Q You are a rookie policeman or a new man, is that right?"

Record — Page 26

"A After you have a year in they usually stop calling you a rookie."

"Q All right. So that in August then you were still a rookie, August of 1962?"

"A I supppose I was."

Record — Page 28

"Q But you didn't have any warrant for Gianfrancesco?"

"A No, we did not."

"Q Either to arrest his person — is that right?"
"A That is right."
"Q —or to search his house, is that right?"
"A That is right."
"Q —or to search his car, is that right?"
"A That is correct."

Record — Page 29

"Q When you first saw Gianfrancesco all you saw was a man sitting in a car, wasn't it?"

Record — Page 30

"A That is correct."
"Q You didn't see him fighting with anybody?"
"A No."
"Q You didn't see him carrying on or creating any public disturbance?"
"A No, he was not."
"Q You didn't see him engaged in any act of violence with anybody else, did you?"
"A No, I did not."
"Q You didn't see him spitting on the sidewalk or violating any of the ordinances of the City of Youngstown, did you?"
"A No."
"Q You didn't see him violating any of the statutes of the State of Ohio, did you?"
"A No, he wasn't."
"Q I beg your pardon?"
"A No, he was not."
"Q That is right. And as you walked toward him you didn't see any violation of any ordinance or statute, did you?"
"A No."

(Page 34 line 13 through line 4, page 37):

"Q Was it a hot day?"
"A It was mild."
"Q A man perspire on a hot August afternoon if he is sitting in a car and the sun is shining?"
"A Usually does."

"Q Would you say that some people carry handkerchiefs in their right hip pocket?"

"A I do."

"Q So that if a man put his hand toward his right hip pocket he could be reaching for a handkerchief, couldn't he?"

"A That is correct."

"Q You didn't never find any gun on Booze, did you?"

"A No."

Record — Page 35

"Q You are not trying to say he was reaching in his pocket for a gun?"

"A No."

"Q When you searched him he didn't have a knife."

"A No."

"Q You are not saying he had a knife?"

"A No."

"Q When you saw his hand, at whatever distance you saw it he was putting his hand toward his right hip pocket, is that right?"

"A That is correct."

"Q Does that cause you to be suspicious as a police officer when you are walking towards a car and the man puts his hand in his hip pocket in broad daylight?"

"A No, normally, no."

"Q What?"

"A No."

"Q This is a much traveled parking center lot, isn't it?"

"A That is correct."

"Q And a man sitting alone in his car doesn't bother you as a policeman, does it?"

"A No."

"Q What?"

"A No."

"Q How long have you known Gianfrancesco?"

Record — Page 36

"A Approximately six months before the arrest."

"Q Gianfrancesco is not what you would call a violent character, is he?"

"A No, he is not."

"Q He isn't the kind of a guy who causes you as a policeman any threat or any fear?"

"A No."

"Q He is by no means a desperate character, is that right?"

"A That is right."

"Q As a police officer, you wouldn't put him in the same category with the other numbers men you might have heard of in Youngstown, would you?"

"MR. VAN BROCKLIN: Objection."

THE COURT: Objection sustained."

"MR. NYBELL: This witness has testified that he is a police officer, and he has known this man and he is familiar with the numbers operations. I want to find out the depth and extent of the familiarity."

"THE COURT: What is your question?"

"Q My question is this: you said that Gianfrancesco was not by police standards considered a dangerous character?"

"A No, he is not."

Record — Page 37

"Q Or desperate character?"

"A No, he is not."

"Q Or one addicted to violence?"

"A No, he is not."

Record — Page 39

"Q You looked inside the car before you saw anything at all is that right?"

"A Yes."

"Q Now, then, you looked in the car before you saw anything at all and then you said to Mr. Gianfrancesco, "What are you doing, Booze?" is that right?"

"A I probably said something to that effect."

"Q Did he say, "I just came out of the store and I just bought a bathing suit"; did he say that to you?"

"A I don't think he told me that then. I am not sure of what he said then. But after I found the bathing suit, why he said that he said that he just bought it."

"Q Did you learn that he had just gone to that store there, the Atlantic Mills Department Store, to buy a bathing suit, did he tell you that?"

"A He said he just bought it. I don't know where he bought it."

"Q There was a bathing suit?"

"A Yes."

"Q Did it appear to be a new bathing suit?"

"A It was brand new."

"Q Brand new bathing suit?"

"A Yes."

"Q Whether there was a sales slip you don't know?"

Record — Page 40

"A I don't know."

"Q Was it in an Atlantic Mills bag?"

"A It was in a bag."

Record — Page 42

"Q When you arrested Gianfrancesco did you ask him if these slips were his?"

"A I assumed they were his."

"Q Did you ask him whether or not they were his?"

"A I didn't ask him if they were his."

"Q Well, in the course of your police training weren't you told or didn't you ever learn that when you find articles of this type in or about somebody that in normal, ordinary police work or investigation you try to find out who they belong to or who owned them or who had them?"

Record — Page 43

"A It should be done, yes, sir."

"Q But you didn't do it?"

"A No, I did not."

"Q Was there any reason why you didn't do it?"
"A I thought it was evident enough that they were in his possession that they were his."
"Q Well, you knew that you could have asked him, didn't you?"
"A I could have asked him if they were his."
"Q And you didn't ask him?"
"A No, I didn't."
"Q You have never seen Gianfrancesco write anything any time anywhere, is that right?"
"A No, I never saw him write anything."
"Q You have never seen him write his name?"
"A I don't think I have ever seen him write anything, no."
"Q You have never seen him write down any figures?"
"A No."

Record — Page 61

"MR. VAN BROCKLIN: I want to move in evidence State's Exhibits 1 through 5, inclusive, at this time?"

"MR. NYBELL: We object, Your Honor, to the introduction of the exhibits."

"THE COURT: First, are you through with this examination here?"

"MR. NYBELL: If the court please, may I consult with Mr. Williams here?"

"The COURT: Yes."

Record — Page 63

"THE COURT: State's Exhibits 1 through 5 are received in evidence."

"MR. NYBELL: Note our objection, please."

Cross Examination of Officer Francis J. Gallagher by Mr. Nybell

Record — Page 72

"Q Mr. Gallagher, on the afternoon of August 17th you were out looking for a fellow whose name is Johnson, Davis or — "

"A John Thomas."

"Q John Thomas, yes. That was completely unrelated, that investigation and that search had nothing whatsoever to do with Mr. Gianfrancesco?"

Record — Page 73

"A No."

"Q But this was just a man that you were looking for in connection with some criminal activity or suspected criminal activitiy, is that rght?"

"A That is right, sir."

"Q And yet before you started out to look for that man you had a search warrant issued, is that right?"

"A No. We had an arrest warrant."

"Q An arrest warrant. Now, then, you didn't have any arrest warrant for Mr. Gianfrancesco on that day?"

"A No."

"Q Nor any search warrant?"

"A No."

"Q In fact, you just happened to see Mr. Gianfrancesco in that parking lot by accident, is that right?"

"A That is right, sir."

"Q You were looking for somebody else and saw him?"

"A Yes, sir."

"Q When you first saw him he was seated in his car by himself, was he?"

"A That is right."

"Q And were there other cars in the parking lot?"

"A Yes, sir."

"Q Was there other traffic in and around the parking lot, people coming, people going, women shopping, so forth?"

Record — Page 74

"A Yes, sir. There always is out there."

"Q It looked like just a routine, ordinary summer afternoon up on this Atlantic Mills shopping place, is that right?"

"A That is right, sir."

"Q So that when you drove into the lot nothing unusual attracted your attention as a policeman, is that right?"
"A No."
"Q When you saw Mr. Gianfrancesco there was nothing unusual about his appearance or his actions that attracted your attention?"
"A No, I didn't even see him first Patrolman Zins did."
"Q Right. When your brother Officer Zins said, "There is Gianfrancesco," or did he say, "There is Booze?"
"A "There is Booze."
"Q "There is Booze." And did he say to you, "Stop the car"?"
"A Yes, sir."
"Q Did he say anything about, "I am going over and shake Booze up," or "shake Booze down"?"
"A No. He just said, "We will go and shake him up, let him know we are working."
"Q "Shake him up." So that when Zins got out of the car he was just going over to shake Booze up a little bit?"

Record — Page 75

"A It is a common practice. Every time you see one of them on the street you stop them—"
"Q Any time you see anybody at all who you have any reason to or any question about, you go over and shake them up, do you?"
"A I wouldn't say it quite that way —"
"MR. VAN BROCKLIN: Please speak up a little louder."
"A If you see anyone on the street who has been arrested before for various crimes or anything like that you usually go up and talk to them."
"Q Is that called "shaking them up"?"
"A I guess."
"Q That is an expression that you use, is it, "Let's go over and shake him up"?"
"A I think Officer Zins used it. It is an old Army expres-

sion. He and I were in the Army, together. That is probably where he used it."

Record — Page 76

"Q Did you know that Booze used to be a truck driver for the city?"

"A No, I didn't."

"Q Well, did you know that he worked for seven months down there in the Engineering Department or the Street Department?"

"A No, sir."

"Q You never learned that in the course of your investigation as a police officer of these people's activities?"

"A No, sir."

"Q Did you know that he worked for the city on two occasions, if memory serves me correctly."

"A No, sir. I did not know that he had ever worked for the city."

"Q What he has ever done or where he had worked you don't know?"

"A I know he had owned a bar or been Steward in a club several times."

"Q Nothing wrong with operating a bar."

"A No."

"Q Is that what you call a legitimate occupation?"

"A I only said that because that is all I know about his occupation. I mean —"

"Q Is there anything wrong or illegal about managing a club?"

"A No."

Record — Page 84

"Q There wasn't anything about Gianfrancesco's character or reputation or your knowledge of him that caused you any concern at all in walking away and taking care of another piece of police business while Zins talked to Gianfrancesco, was there?"

"A No."

"Q There isn't anything about Booze that would cause you any reason to stay there while Zins was talking to him?"
"A How do you mean?"

Record — Page 85

"Q Well, Booze isn't considered to be a desperate man?"
"A No."
"Q Or a violent man?"
"A No."
"Q Or a dangerous man?"
"A No."
"Q Is that right?"
"A No, I wouldn't consider him that."
"Q Is that right?"
"A I wouldn't consider him that."
"Q Now, then, you have known Mr. Gianfrancesco for how long as a police officer?"
"A As a police officer?"
"Q Yes."
"A Oh, since June."
"Q Did you know him before that as a man who ran a club and who ran a tavern?"
"A I knew him casually."
"Q Just a casual acquaintance?"
"A Yes. I knew who he was. I believe he knew who I was."

Record — Page 90

"Q You booked him, Mr. Gallagher?"
"A I believe I took him up myself and booked him, — I don't think I fingerprinted him, — and signed the docket chart."
"Q You know what charge you booked him on?"
"A Suspicion directly."
"Q Suspicion is the charge that the police officers customarily place against a man when they want to hold him for investigation for a short period?"
"A Yes. This or on a felony."

"Q You know neither under the statutes of Ohio nor under the city ordinances of Youngstown, nor under the laws of the Congress of the United States is there any offense of the crime of suspicion, don't you, do you know that?"
"A Yes, sir."

Record — Page 93

"Q I will withdraw the question.

Now, then, Mr. Gallagher, this arrest that you made, was it made by you or Zins?
"A How do you mean that?"
"Q Who told Mr. Gianfrancesco, "You are under arrest," or did anybody say, "You are under arrest."?"
"A Patrolman Zins did, but, of course, we would both be on the arrest."
"Q Where were you standing or where were you when Zins said, "You are under arrest."?"
"A Slightly to the rear of the car about back by the fender."
"Q And when Zins said, "You are under arrest." you had already transacted this business on the police radio, hadn't you, that took two or three minutes?"
"A Yes, sir."
"Q And you had already parked the car originally and got out and started toward Booze's car and then turned around and walked back?"
"A Yes, sir."
"Q And that took some time, didn't it?"
"A Yes, sir.'
"Q So that Zins had been in and around that automobile for four or five minutes before anybody said he was under arrest, isn't that right?"

Record — Page 94

"A Yes, sir."
"Q And during the four or five minutes that Zins was in the automobile do you know what he was doing?"
"A No sir."

"Q He was looking for something, wasn't he?"
"A Well, I wasn't watching him when I was in the car."
"Q Isn't that why he went over there, was to shake Booze up or shake Booze down?"
"A Shake him up."
"Q Shake him up. So he was over there for four or five minutes shaking Booze up and you don't know how he was shaking him up?"
"A I wasn't there."

"MR. NYBELL: No. That is all. Thank you.

"MR. VAN BROKLIN: That is all, Mr. Gallagher. Thank you."

Cross examination of Officer Thomas Kelty by Mr. Nybell

Record — Page 111

"Q What do you understand by the term "backer" in the numbers business?"
"A That would indicate the person or persons who pays off the numbers when someone hits."

Record — Page 112

"Q Do you know any backers of the numbers business in Youngstown now?"
"A I would say that the Naples are a backer."
"Q Who else besides the Naples are a backer?"
"A You want my supposition, or do you want —"
"Q Yes. I want to find out who, in your expert opinion the backers are."
"A I believe that George Economus is a backer, the Naples brothers."
"Q Go ahead. Is that all?"
"A John Burnich."
"Q All right. Who else is a backer? Burnich, Naples, who else? Economus."
"A That is all that I could say."
"Q You would say that there are three backers: Naples, Burnich, and Economus are backers?"

"A Yes."

"Q Now, then, on August 17, 1962, you never saw Gianfrancesco sell anything, did you?"

"A No, sir."

"Q On August 17, 1962, you never saw Gianfrancesco receive any money, did you?"

"A No, sir."

"Q Have you ever seen Gianfrancesco at any time sell any thing?"

Record — Page 113

"A No, sir."

"Q Have you ever seen Gianfrancesco at any time receive any money?"

"A No, sir."

"Q Read that indictment, will you please, for just a minute."

"A Indictment for promoting a numbers game . . ." —"

"Q Just read it to yourself. I want you to be familiar with it. Now, you think you have read it now so that you understand it?"

"A Yes, sir."

"Q On August 17th you don't know whether or not Gianfrancesco was a backer in the numbers game, do you?"

"A No, sir."

"Q In fact, you said the only backers you know are Naples, Burnich, and you mentioned somebody else, Economus, is that right?"

"A Yes, sir."

"Q Those are the backers, all the backers you know?"

"A Yes, sir."

"Q You never saw Gianfrancesco sell anything, is that right?"

"A No, sir."

"Q And you never saw Gianfrancesco receive any money?"

Record — Page 114

"A No, sir."

"Q Do you know any backers that drive four-year old automobiles?"

"THE COURT: What was that question?"

"MR. NYBELL: Do you know any backers that drive four-year old automobiles?"

"THE COURT: All right. I just didn't hear your question."

"A No, sir."

"Q Backers usually drive newer cars than that, don't they, Kelty?"

"A Yes, sir."

"Q Aren't most of the backers at this time of the year usually down in Florida?"

"A I don't know."

"MR. VAN BROCKLIN: I object to that. He wouldn't know."

"Q All right. At any rate, do you know that Gianfrancesco was a truck driver for the city?"

"A Yes, sir."

"Q Now, you say that Gianfrancesco lived some place else other than Marmion Avenue?"

"A He has given other addresses."

"Q You know he and his wife are separated?"

"A No, sir."

"Q You know he has five children?"

"A I know he has children."

"Q Did you know that he has five?"

"A No, sir."

"Q Do you know that he lives with his mother and father up on East Delason Avenue?"

"A He has given that address at one time or the other."

"Q Well, do you know that he lives there?"

"A No, sir."

"Q You know nothing about the events of August 17, 1962?"

"A No, sir."

"Q Can you look at any one of those slips there and tell us whether or not any of them, or pick out any item in all those slips there that you have examined and tell us whether or not any of them have Gianfrancesco's handwriting on them?"

"A I don't know Gianfrancesco's handwriting."

"Q So whether Gianfrancesco ever had anything to do with any of those slips you don't know?"

"A No, sir."

"MR. NYBELL: That is all, Kelty. Thank you very much."

STATE RESTS

Record — Page 124

"THE COURT: All right."

"MR. VAN BROCKLIN: With that, the State will rest, Your Honor."

"THE COURT: All right."

"MR. WILLIAMS: If the court please, we have a legal question to take up with the court, and we wonder if the jury might be dismissed at this time."

"THE COURT: Defense counsel has a matter of law which they wish to discuss with the court, so the jury will retire at this time to your jury room. Please observe the usual caution until we recall you. Thank you."

Record — Page 125

"(Jury leaves the courtroom.)"

"MR. WILLIAMS: I want to make up the record here."

"Defendant, by his counsel, comes now and respectfully moves the court to suppress the evidence obtained and offered in evidence on the ground that it was obtained in violation of the Constitution of the State of Ohio, Article V and XIV of the Constitution.

"Defendant's counsel further moves the court to arrest the testimony from the consideration of the jury and direct a verdict of acquittal on the ground that the State has not established the essential elements of the offense charged in the indictment.

Defendant's counsel further moves the court to discharge the defendant for the further reason that the evidence uncontradictedly shows there was no basis for the arrest of the defendant, he at the time having not been in the commission of a misdemeanor or a felony.

"I think that is all, Your Honor."

"THE COURT: Each of the motions made by counsel on behalf of the defendant, the defendant being in open court at the time of the making of said motions, are hereby overruled, with exceptions to the defendant."

DEFENDANT RESTS

Record — Page 128

"MR. NYBELL: Does the record show that at the conclusion of all of the evidence and following the resting of the defense's case that the defense renewed all of the motions previously made in this cause?"

"THE COURT: Show that they are all overruled, with exceptions to the defendant."

STATMENT OF TRIAL COURT TO JURY AFTER SEVERAL HOURS OF DELIBERATION

Record — Page 142

"3:30 o'clock p.m."

"(Jury in the courtroom)"

"THE COURT: You are hard-working jurors."

"You will have to stay until you reach a verdict.

So then I would ask you whether there is a reasonable chance of reaching a verdict. Who is your foreman?"

"JURY FOREMAN: I am, Your Honor."

"THE COURT: What do you say?"

"JURY FOREMAN: I wish I knew."

"THE COURT: Give you another half hour?"

"JURY FOREMAN: We are closer to a verdict, but I don't know whether we will ever reach one, to tell you the truth."

"THE COURT: Well, why don't you go and try for another half hour and let the court know by the buzzer when you are ready and we will reconsider this matter at that time. All right. Thank you."

"(Jury leaves the courtroom.)"

EXHIBITS

Record—Page 143

"IN RE: EXHIBITS"

"The following-described exhibits, being too cumbersome to attach to this Defendant's Bill of Exceptions, the same have been placed in a separate envelope and have been duly impounded with the Clerk of Courts.

"State's Exhibit Number 1 (A) through (E): Slips of white paper, with numbers and other data on them, with cardboard:

"State's Exhibit Number 2 (A) through (SS): Slips of white paper, with numbers and other data on them;

"State's Exhibit Number 3 (A) through (L): Slips of white paper, with numbers and other data on them;

"State's Exhibit Number 4: Manila envelope, containing $20.00 in change; '$20 Change' written on envelope.

State's Exhibit Number 5: Manila envelope, initialed by 'Robert R. Zins and Frances J. Gallagher,' with the following written on envelope: '8-17-62 6e Slips and $20 in change

found in docket No. 1066-4067. Anthony Gianfrancesco—in car.'

"State's Exhibit Number 6: Certificate of Title Number 500 055172.

"Defendant's Exhibit Number 1: Pittsburgh Post-Gazette, dated Thursday, February 14, 1963."

APPENDIX C

STATE OF OHIO COUNTY OF MAHONING STATE OF OHIO, Plaintiff vs. ANTHONY GIANFRANCESCO, Defendant	ss	IN THE COURT OF COMMON PLEAS CASE NO. 21776 MOTION TO SUPPRESS

Now comes the defendant, by his counsel, and represents to the Court that he has been reliably informed that the State of Ohio will seek to offer in evidence certain slips of paper, books with numbers, and other data which were taken from defendant's automobile on the 17th day of August, 1962. The books, papers, numbers and other data so taken were obtained and seized by an illegal search and without warrant, in violation of the Bill of Rights and the Constitutions of the State of Ohio and the United States.

By reason of the foregoing, counsel for defendant files this, his Motion to Suppress all evidence so obtained, which is in the hands of the Prosecuting Attorney, investigating officers and/or arresting officers, and to direct those so possessing said articles obtained in the fashion hereinbefore described to the defendant prior to the trial of this cause.

Counsel for defendant further respectfully moves the Court that this Motion be set for oral hearing at a time convenient to the Court so that evidence may be introduced in support of this Motion.

/s/ Edward L. Williams
EDWARD L. WILLIAMS
1101-3 Union National Bank Bldg.
Youngstown 3, Ohio
Attorney for Defendant

Brief in Support of Motion

The automobile of the defendant was searched without a search warrant.

The State will attempt to offer evidence obtained by reason of an unlawful search and seizure without a search warrant in violation of the Constitution of the United States and the Constitution of the State of Ohio and the Bill of Rights. For that reason, we respectfully submit that the Motion to Suppress should be sustained and that any and all evidence obtained by reason of unlawful search and seizure and without warrant should be held to be in violation of the Federal and State Constitutions.

The Court's attention is directed to the case of Mapp vs. State of Ohio, 367 U. S., 643; 6 L. Ed. 2d, 1081, 81 S. Ct. 1684, 84 A. L. R. 2d, 933.

Also: *Young vs. Commonwealth of Kentucky*, 230 Ky 767, 20 S. W. 2d, 730, wherein it was held:

> "Opening of door of car to get shelter will not justify search without warrant if liquor not disclosed to view before door was opened."
>
> In the instant case, the facts are almost identical.
>
> See also: *State vs. Mendel*, 5 O. O., 312, syl. 3:
>
> "Before an officer is entitled to search one's person or premises without a search warrant, he must have some information concerning a violation of the law, and where the defendant has violated no statute, law, or ordinance or done anything which would give the officer a reasbn for the arrest, the arrest and search is unlawful though the one arrested and searched is found to be transporting liquor contrary to law."

Respectfully submitted,

/s/ Edward L. Williams
1101-3 Union National Bank Bldg.
Youngstown 3, Ohio
Attorney for Defendant

Copy of foregoing Motion to Suppress
and Brief acknowledged this 10th
day of December, 1962.

LOREN VAN BROCKLIN
Acting Prosecuting Attorney
By */s/ C. W. Osborne*

Office-Supreme Court, U.S.
FILED
SEP 28 1964
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

October Term, 1964

No. 542

ANTHONY GIANFRANCESCO, Petitioner

vs.

THE STATE OF OHIO, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

EDWARD L. WILLIAMS
W. GLENN OSBORNE
Counsel for Petitioner

1101-3 Union National Bank Building
Youngstown, Ohio 44503

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IN THE
SUPREME COURT OF THE UNITED STATES

NO.
October Term, 1964

ANTHONY GIANFRANCESCO, Petitioner

vs.

THE STATE OF OHIO, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

To the Honorable Earl Warren, Chief Justice of the United States, and Associate Justices of the Supreme Court of the United States:

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Ohio entered in the above entitled case on June 3rd, 1964, Motion for Rehearing being denied on the 1st day of July, 1964.

CITATION TO OPINIONS BELOW

The trial court issued no written opinion; the Court of Appeals, Seventh Judicial District, State of Ohio, and the Supreme Court of the State of Ohio issued no written opinion, but merely journalized their entry, sustaining the court below. (See Appendix B, pages 18-22.) These decisions are unreported.

JURISDICTION

A judgment of the Supreme Court of Ohio was entered on June 3, 1964; a timely motion for rehearing was filed, which was denied by the Supreme Court of the State of Ohio on the 1st day of July, 1964. Jurisdiction of this Court is invoked under 28 U. S. C., Section 1257 (3), since a question of the constitutional rights of the Petitioner under Amendments IV, V, and XIV of the Constitution of the United States were raised by objection to the admission of certain evidence and exhibits in the trial court and were further raised by Assignments of Error and brief

through the appeals court, Seventh Judicial District, State of Ohio, and the Supreme Court of the State of Ohio—both courts holding that there was no error prejudicial to the Petitioner and that no substantial constitutional question existed.

QUESTIONS PRESENTED

(1) Whether the trial court violated the constitutional rights of the Petitioner as protected by Amendments IV, V, and XIV of the Constitution of the United States by permitting the State to admit certain exhibits obtained by police officers in searching Petitioner's car and other cars out of the presence of the Petitioner, and evidence that the Petitioner possessed a federal gambling stamp.

(2) Whether the constitutional rights of Petitioner as protected by Amendment XIV of the Constitution of the United States have been violated, where the trial court, after submitting the case to the jury at the close of all the evidence, failed to dismiss two alternate jurors, as prescribed by a mandatory statute of the State of Ohio, i.e., Revised Code, Section 2313.37; and further, by permitting said two alternate jurors, after the twelve jurors had been deliberating for approximately two hours, to accompany the twelve jurors to dinner.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions involved are the Fourth, Fifth and Fourteenth (Section 1) Amendments of the Constitution of the United States, and Article I, Section Five and Section Ten of the Constitution of the State of Ohio; and the statutory sections referred to and involved are:

Section 2915.12,
Section 2915.13,
Section 2313.37

of the Revised Code, State of Ohio; and 26 U. S. C. A., Chapter 35, Sections 4401, 4411 and 4412. They are printed in Appendix A, pages 13-17.

STATEMENT

On the 5th day of October, 1962, the Petitioner was arrested without warrant at gunpoint, together with three other individuals, in a parking area immediately to the south of the front entrance of the North Side Unit of The Youngstown Hospital Association—said parking area being used by many persons in going to and from said hospital.

The three other individuals arrested at such time and place, to-wit: R. J. Manuel, William Baker, and Joseph Mosco, subsequent to their arrest plead guilty to a violation of the Revised Code of the State of Ohio, Section 2915.12 (Appendix A, page 15), as a misdemeanor, and were sentenced to thirty days in county jail and required to pay a fine of Five Hundred Dollars ($500.00). Approximately twenty to twenty-five minutes following the arrest of the Petitioner and the three individuals referred to above (R. 43) (Appendix C, page 23) three other individuals were arrested on Goleta Avenue, which is the first street to the east of the North Side Unit of The Youngstown Hospital Association, and is some distance from where the original arrest took place.

The three individuals arrested on Goleta Avenue were Pat Bostic, George Economus and Fred Taddei. Mr. Bostic, subsequent to this arrest, plead guilty to a charge of violating Revised Code of the State of Ohio, Section 2915.12, as a misdemeanor and received a sentence of thirty days in the county jail and Five Hundred Dollars ($500.00) fine. Mr. Economus and Mr. Taddei were subsequently released without charge.

The arrests made had been planned by the Police Department of the City of Youngstown, Mahoning County, Ohio, for some time. On October 5, 1962, seven police officers were "planted" in various locations around the parking area at the North Side Hospital. Officer Dan Maggianetti was in charge of the stakeout. In spite of

the fact that this was a planned arrest, Officer Maggianetti, who was in charge, failed to obtain any arrest warrants or search warrants. (R. 44-45) (Appendix C, page 23).

At the time of Petitioner's arrest, he was immediately taken from the scene of said arrest to a police cruiser which had been parked in front of the Nurses' Home, some distance away from the place of arrest, (R. 191-195) (Appendix C, pages 26-27) and a search was made of Petitioner's automobile and other automobiles which were at the scene of the arrest, and this search was conducted out of the presence of said Petitioner. (R. 211) (Appendix C, page 28). Further, the subsequent arrest and evidence obtained by a search were out of the presence of said Petitioner.

On April 18, 1963, the Petitioner was indicted by the Trumbull County Grand Jury for violation of Revised Code of the State of Ohio, Section 2915.13 (Appendix A, page 16), charging, in substance, that he "did unlawfully carry on a scheme of chance known as 'policy', 'numbers game', or 'clearing house', in violation of said section." Petitioner entered a plea of not guilty to said charge. On June 4, 1963, trial was commenced.

During the trial of the case, objections were taken to the admission of exhibits which were obtained as a result of the search made of Petitioner's car and other cars at the scene (R. 269-272) (Appendix C, page 28), and also, objections were taken to the admission of evidence that Petitioner was the owner of a federal gambling stamp. (R. 366-367) (Appendix C, page 30).

At the close of the submission of evidence on June 6, 1963, the trial court failed and neglected to discharge two alternate jurors, as required by a mandatory statute, Revised Code of Ohio, Section 2313.37. (Appendix A, page 14). The trial court also permitted these two alternate jurors to accompany the twelve jurors, who had been deliberating the case for approximately two hours, to dinner. (R. 382-384) (Appendix C, page 31).

On June 6, 1963, Petitioner was found guilty by the jury and sentenced to pay a fine of Five Hundred Dollars ($500.00) and costs, and sentenced to the Ohio Penitentiary for a period of from one to ten years. Execution of sentence was suspended pending appeal. Petitioner's Motion for New Trial was overruled, and the Court of Appeals, Seventh Judicial District, State of Ohio, and the Supreme Court of Ohio upheld said conviction, stating that there was no error prejudicial to the rights of the Petitioner and that there was no constitutional question involved:

REASONS FOR GRANTING WRIT

1. The following exhibits were offered and admitted by the trial court on behalf of the State in the prosecution of the Petitioner: State's Exhibits 1, 19, 20, 21, 22, 23, 24, 25 and 26, which were, supposedly, items and paraphernalia used by persons engaged in writing numbers. The arrests were without benefit of an arrest warrant and the exhibits were secured by the police officers without benefit of a search warrant, and said search of various automobiles were made out of the presence of the Petitioner who, immediately after the arrest, had been taken away to a police cruiser a considerable distance away from the place of the arrest.

The last exhibit offered by the State (Exhibit 27) on objection, was excluded by the trial court (R. 269-272) (Appendix C, page 28), reasoning that evidence obtained as a result of the arrest and search on Goleta Avenue was too remote to be admissable against Petitioner, but over objection, stated that all other evidence and exhibits were proper.

It seems clear that the trial court considered all other exhibits offered by the State to be relevant and competent and any further objection on behalf of counsel for the Petitioner would seem to be unnecessary.

In a recent decision, March 23, 1964, by this Court in the case of **John Brenton Preston, Petitioner, vs. United States,** found in 11 L. Ed. 2d, 777, in an opinion written by Justice Black, which was unanimously supported, syllabus 1 states:

"A search of an automobile by state officers after the arrest for vagrancy of those sitting in the car, their removal to police headquarters, and the taking of the car to a garage, is too remote in time and place to be incidental to the arrest and when undertaken without a search warrant violates the test of reasonableness under the Fourth Amendment and renders inadmissable in the federal bank robbery prosecution the evidence obtained as a result of the search."

Syllabus 3:

"Searches of motor cars must meet the test of reasonableness under the Fourth Amendment before evidence obtained as a result of such searches is admissable."

Syllabus 8:

"The justification for permitting the search of an accused incident to lawful arrest are absent where search is remote in time or place from the arrest."

Although the facts in the Preston case are not identical with those in the present case, particularly as to the lapse of time from the making of the arrest and the search, there is no question that the Petitioner, after the arrest, was removed from the place of arrest and the search of his car, and other cars, was made out of his presence, and the principle as set out in the Preston case is applicable to the present case now before this Court.

Within a short period of time the police officers had arrested Petitioner and six other men. These men had been removed from the scene of the arrest and the search of the cars was made out of the presence of those arrested. Considerable evidence was gathered in the search of the vehicles. In a situation such as this, where there were so many arrests and so much evidence was obtained,

it leaves a wide discretion in the hands of the searching officer as to the exact location where various items were found. Not only does it leave too wide a discretion in the searching officer, or officers, but it permits too much room for honest mistake as to where various items are found, bearing in mind that four of the seven arrested plead guilty to a charge of gambling, and two men arrested were dismissed; and further, that none of the exhibits so offered were found on the person of the Petitioner (R. 186-187—Appendix C, page 25), it certainly leaves Petitioner at the mercy of the officer, or officers, conducting the search out of his presence.

2. Under the provisions of 26 U. S. C. A. (Internal Revenue Code), Chapter 35, Sections 4401-4411-4412 (Appendix A, pages 16-17), Petitioner registered and obtained a federal gambling stamp. During the trial of Petitioner (R. 366-368), (Appendix C, page 30), the fact that he had such gambling stamp was used as evidence against him in order to establish the State's case.

The use of such evidence against a defendant in a state court amounts, in substance, to entrapment and the method of obtaining such evidence is sufficiently shocking so as to violate the due process clause of the Fourteenth Amendment of the Constitution of the United States.

Although the federal government does not authorize gambling under Chapter 35 of 26 U. S. C. A.—"Taxes on Wagers"—certainly gambling is not prohibited, so long as those accepting wagers register and pay their tax. So we have the federal government collecting a tax on wagers, and in this case the State of Ohio, by passage of R. C. 2915.13 (Appendix A, page 16), saying that gambling is illegal, and using the fact that Petitioner has a federal gambling-stamp as evidence to prove a violation of state law.

In the case of **Rochin vs. California,** 342 U. S., 165, 95 L. Ed., 183, 72 S. Ct., 205, the Supreme Court of the United States reversed a conviction which had been upheld by the District Court of Appeals, Second District of California, wherein evidence was obtained from the accused by causing the accused to vomit up morphine capsules which he had swallowed, and using the evidence so obtained to support a conviction. Although no physical violence was exerted on the Petitioner in this case as was true in the Rochin case, still it appears to be a subtle way of accomplishing the same result, and therefore should come under the same exclusionary rule.

The Rochin case (supra), syllabus 5, and the Opinion written by Frankfurter, J., at page 172, 342 U. S., states:

> "* * * It has long since ceased to be true that due process of law is heedless of the means by which otherwise relevant and credible evidence is obtained."

Further on in the Opinion it states:

> "* * * Due process of law as a historic and generative principle precludes defining and thereby confining these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend 'a sense of justice'. (Citing Mr. Chief Justice Hughes speaking for unanimous accord in Brown vs. Mississippi, 297 U. S. 278, 285, 286.)."

To argue that Petitioner voluntarily obtained a federal gambling stamp and is, therefore, precluded from raising the question seems to ignore the basic question of fairness. The federal government dangles the forbidden fruit in front of the Petitioner's nose, stating in substance, "You can gamble as long as you pay the federal tax." The State of Ohio disagrees, and says, "It is against the law to gamble," and uses the Petitioner's compliance with

federal law to convict him. By the terms of the Fourteenth Amendment of the Constitution of the United States (Appendix A, page 13), Petitioner is a citizen of both the United States and the State of Ohio. In an attempt to satisfy one, he displeases the other, and by so doing is deprived of his liberty. This, in the least, offends a sense of justice, and is a denial of due process.

In the case of **Talmadge Raley, Joseph Stern, Emmett Calvin Brown, Appellants vs. State of Ohio; Anna H. Morgan, Appellant vs. State of Ohio,** 360 U. S. 423, 3 L. Ed. 2d, 1344, 79 Supreme Court, 1257, Brennan, J., speaking for the Court, reversed as to all but one of the defendants, as involving denials of due process, since the persons convicted of contempt for refusing to answer certain questions before the Ohio Un-American Activities Commission had merely exercised a privilege which the State, through the legislative commission, had clearly told them was available. At pages 425 and 426 of 360 U. S., it is stated:

> "After the Commission, speaking for the State, acted as it did, to sustain the Ohio Supreme Court's judgment would be to sanction an indefensible sort of entrapment by the State—convicting a citizen for exercising a privilege which the State had clearly told him was available to him."

The reasoning in the Raley case is applicable to Petitioner's case now before the Court.

(3) Article I, Section 5 and Section 10, of the Constitution of the State of Ohio (Appendix A, page 14), preserves to Petitioner the right to trial by jury and contemplates a jury of twelve as at common law.

See: **Work vs. State,** 2 O. S., 296;
State Ex Rel. Warner vs. Baer, et al., Judges, 103 O. S., 585.

Under the provisions of Revised Code, State of Ohio, Section 2313.37 (Appendix A, page 14), the trial court has authority to select alternate jurors, but said section specifically provides:

> "Such additional or alternate juror shall be liable as a regular juror for failure to attend the trial or to obey an order or admonition of the court to the jury, shall receive the same compensation as other jurors and, except as provided in this section, shall be discharged upon the final submission of the case to the jury."

Two alternate jurors were selected during Petitioner's trial. At the close of all the evidence and upon final submission of the case to the jury (R. 382) (Appendix C, page 31), the trial court failed to discharge the two alternate jurors as required by the mandatory provisions of Revised Code of Ohio, Section 2313.37.

After the twelve original jurors had been deliberating on the case for approximately two hours (R. 382-384) (Appendix C, page 31), the trial court called them into the court room and permitted said jurors to go to dinner in charge of the bailiff, and at this time the trial court also permitted the two alternate jurors to go to dinner with the twelve original jurors who had been deliberating on the case.

The Court made no provision concerning the alternate jurors to the effect that they should remain in the custody of the bailiff during the deliberations of the twelve jurors, nor did he caution them or instruct them in any way as to their conduct and actions during deliberations of the twelve jurors.

The provisions of Revised Code, Section 2313.37 (Appendix A, page 14) are mandatory. During the two-hour period the two alternate jurors could have discussed the case with many persons and have formed opinions

other than on the evidence heard during the trial, and even though the Court admonished the jury during the dinner hour not to discuss the case, to permit these two alternate jurors to be present with the twelve jurors deliberating on the case is fraught with danger to the rights of the Petitioner to a fair and impartial trial, and is in violation of the protection afforded to him under the due process clause of the Fourteenth Amendment of the Constitution of the United States.

In the case of **Harold D. Rogers, Petitioner, vs. Mark S. Richmond, Warden,** 365 U. S. 534, 5 L. Ed. (2d) 760, 81 Sup. Ct. 735, on a habeas corpus application made by the Petitioner in the United States District Court in the State of Connecticut, the District Court had denied relief and the Court of Appeals for the Second Circuit had affirmed. On certiorari the Supreme Court of the United States reversed and remanded the case to the Court of Appeals to be held in order to give the state an opportunity to retry Petitioner within a reasonable time.

This particular case involved the admission of a confession by the accused in the state court, and in Syllabus 7 of the case it was stated:

> "A defendant in a state criminal trial has the right to be tried according to the substantive and procedural due process requirement of the Fourteenth Amendment."

The act of the trial court in the instant case in permitting the two alternate jurors to accompany the twelve jurors to dinner violated both a substantive and procedural right guaranteed the Petitioner under the provisions of the XIV amendment of the Constitution of the United States.

In the case of **People of the State of New York, Respondents, vs. Donald Edward King, Appellant,** 216 N. Y.

Sup. 2d series 638, 13 A. D. 2d 264 in the reversal of a conviction of the defendant for first degree robbery, Syllabus 3 states:

> "Under no circumstances may more than twelve jurors participate in actual deliberations and alternate jurors may not be with regular jurors after deliberations have been commenced."

The trial court in this case had permitted two alternate jurors to go to lunch with the twelve regular jurors.

See also the case of **People vs. Britton, et al,** Supreme Court of California, 52 P. (2d), 217, the syllabus in the case states:

> "Presence of alternate juror in the jury room while jury was deliberating upon verdict held reversible error, notwithstanding instruction that while alternate juror might listen to deliberations, she was not to express any opinion or to participate therein."

In the case of **People vs. Bruneman,** District Court of Appeals, Second District, Division One, California, 40 P (2d) 891, Syllabus 3 states:

> "Presence in jury room during deliberations of jury in criminal case of alternate juror to whom case had not been submitted for deliberation held reversible error as invasion of right of jury trial, notwithstanding consent of defendant's attorney."

CONCLUSION

For the foregoing reasons this petition for Writ of Certiorari should be granted.

Respectfully submitted,

Edward L. Williams

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APPENDIX A

CONSTITUTION OF THE UNITED STATES

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

AMENDMENT V

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CONSTITUTION OF THE STATE OF OHIO

ARTICLE I

Section 5. Trial by Jury

The right of trial by jury shall be inviolate, except that, in civil cases, laws may be passed to authorize the rendering of a verdict by the concurrence of not less than three-fourths of the jury.

Section 10. Trial for Crimes; Witness

Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law. In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed; but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance can not be had at the trial, always securing to the accused means and the opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court. No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the court and jury and may be the subject of comment by counsel. No person shall be twice put in jeopardy for the same offense.

REVISED CODE—STATE OF OHIO

SECTION 2313.37 Duties of Alternate Juror

In the trial in the court of common pleas of any case, civil or criminal, when it appears to the judge presiding that the trial is likely to be protracted, upon direction of the judge after the jury has been impaneled and sworn,

an additional or alternate juror shall be selected in the same manner as the regular jurors in said case were selected, but each party is entitled to two peremptory challenges as to such alternate juror. Such additional or alternate juror shall be sworn and seated near the jury, with equal opportunity for seeing and hearing the proceedings and shall attend at all times upon the trial with the jury and shall obey all orders and admonitions of the court to the jury, and when the jurors are ordered kept together in a criminal case, said alternate juror shall be kept with them. Such additional or alternate juror shall be liable as a regular juror for failure to attend the trial or to obey any order of admonition of the court to the jury, shall receive the same compensation as other jurors, and except as provided in this section shall be discharged upon the final submission of the case to the jury. If before the final submission of the case to the jury a juror becomes incapacitated or disqualified he may be discharged by the judge, in which case, or if a juror dies, upon the order of the judge, said additional or alternate juror shall become one of the jury and serve in all respects as though selected as an original juror.

REVISED CODE—STATE OF OHIO

SECTION 2915.12. Promoting Lottery or Scheme of Chance.

No person, for his own profit, shall establish, open, set on foot, carry on, promote, make, draw, or act as "backer" or "vendor" for or on account of a lottery or scheme of chance, by whatever name known, located in or to be drawn, paid, or carried on within or without this state, or by any of such means, sell or expose for sale anything of value.

Whoever violates this section shall be fined not more than five hundred dollars and imprisoned not more than six months for a first offense; for each subsequent offense, each person shall be fined not less than five hundred nor more than one thousand dollars and imprisoned not less than one nor more than three years.

SECTION 2915.13 Penalty for Promoting a "Numbers Game"

No person shall establish, open, set on foot, carry on, promote, make, draw, or act as "backer" or "vendor" for or on account of a scheme of chance known as "policy," "numbers game," "clearing house," or by words or terms of similar import, located in or to be drawn, paid, or carried on within or without this state, or by any of such means sell or expose for sale anything of value.

Whoever violates this section shall be fined not less than five hundred nor more than one thousand dollars and imprisoned not less than one nor more than ten years.

TAXES ON WAGERING

26 U. S. C. A., Chapter 35, Section 4401. Imposition of Tax

(a) Wagers. There shall be imposed on wagers, as defined in Section 4421, an excise tax equal to 10 per cent of the amount thereof.

(b) Amount of Wager. In determining the amount of any wager for the purposes of this subchapter, all charges incident to the placing of such wager shall be included; except that if the taxpayer establishes, in accordance with regulations prescribed by the Secretary or his delegate, that an amount equal to the tax imposed by this subchapter has been collected as a separate charge from the person placing such wager. the amount so collected shall be excluded.

(c) Persons Liable for Tax. Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery.

Chapter 35, Section 4411. Imposition of Tax

There shall be imposed a special tax of $50 per year to be paid by each person who is liable for tax under Section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable.

Chapter 35, Section 4412. Registration

(a) Requirement. Each person required to pay a special tax under this subchapter shall register with the official in charge of the internal revenue district—

(1) his name and place of residence;

(2) if he is liable for tax under subchapter A, each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf; and

(3) if he is engaged in receiving wagers for or on behalf of any person liable for tax under subchapter A, the name and place of residence of each such person.

(b) Firm or Company. Where subsection (a) requires the name and place of residence of a firm or company to be registered, the names and places of residence of the several persons constituting the firm or company shall be registered.

(c) Supplemental Information. In accordance with regulations prescribed by the Secretary, he or his delegate may require from time to time such supplemental information from any person required to register under this section as may be needful to the enforcement of this chapter.

APPENDIX B

COURT OF APPEALS OF OHIO
SEVENTH APPELLATE DISTRICT
COUNTY OF TRUMBULL
NO. 1587

STATE OF OHIO Plaintiff-Appellee vs. ANTHONY GIANFRANCESCO Defendant-Appellant	**APPEAL ON QUESTION OF LAW FROM TRUMBULL COUNTY COMMON PLEAS COURT**

Date_____, 1963.

This cause came on to be heard on the appeal on question of law from the judgment of the Trumbull County Common Pleas Court and was argued by counsel for the parties; and upon consideration, the court finds no error prejudicial to the appellant and therefore the judgment of the Trumbull County Common Pleas Court is affirmed and it is ordered that appellee recover of appellant his costs herein taxed.

The court finds there was reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Trumbull County Common Pleas Court to carry this judgment into execution.

/s/ Paul W. Brown
Presiding Judge
/s/ James G. France
/s/ George M. Jones

Approved by:

/s/ Lynn B. Griffith, Jr.
Attorney for Plaintiff-Appellee

/s/ Jack W. Nybell by E. L. Williams
Attorney for Defendant-Appellant

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO City of Columbus	1964 TERM To wit: June 3, 1964

No. 38681

State of Ohio Plaintiff-Appellee vs. Anthony Gianfrancesco Defendant-Appellant	MOTION FOR LEAVE TO APPEAL FROM THE COURT OF APPEALS for TRUMBULL County

It is ordered by the Court that this motion is overruled.

COSTS:

Motion Fee, $20.00, paid by Edward L. Williams.

I, THOMAS L. STARTZMAN, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this 13th day of July, 1964.

THOMAS L. STARTZMAN, Clerk
/s/ Norman L. Myers, Deputy

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO City of Columbus	1964 TERM To wit: June 3, 1964

State of Ohio Plaintiff-Appellee vs. Anthony Gianfrancesco Defendant-Appellant	NO. 38681 APPEAL FROM THE COURT OF APPEALS FOR TRUMBULL COUNTY

This cause, here on appeal as of right from the Court of Appeals for Trumbull County was heard in the manner prescribed by law and upon motion of the appellee to dismiss such appeal.

On consideration thereof, such appeal is dismissed for the reason that no substantial constitutional question exists herein.

It is further ordered that the appellee recover from the appellant its costs herein expended; that a mandate be sent to the Court of Common Pleas to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Trumbull County for entry.

I, THOMAS L. STARTZMAN, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this 13th day of July, 1964.

THOMAS L. STARTZMAN, Clerk
/s/ Norman L. Myers, Deputy

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO City of Columbus	1964 TERM To wit. June 3, 1964
State of Ohio Plaintiff-Appellee vs. Anthony Gianfrancesco Defendant-Appellant	NO. 38681 MANDATE

To the Honorable Court of Common Pleas

Within and for the County of Trumbull, Ohio, Greeting:

The Supreme Court of Ohio commands you to proceed without delay to carry the following judgment in this cause into execution:

Dismissed for the reason that no substantial constitutional question exists herein.

THOMAS L. STARTZMAN,
Clerk
July 13, 1964

THOMAS L. STARTZMAN
/s/ Norman L. Myers, Deputy

RECORD OF COSTS

Docket Fee	$2.00	Paid by L. B. Griffith, Jr.
Docket Fee	$____	Paid by_____
Docket Fee	$____	Paid by_____
Printing Record . .	$____	Paid by_____
Supplemental Record	$____	Paid by_____
Sheriff's Costs . .	$____	Paid by_____
Sheriff's Costs . .	$____	Paid by_____

THE STATE OF OHIO } 1964 TERM
City of Columbus } To wit: Thur., July 16, 1964

State of Ohio
Plaintiff-Appellee
vs.
Anthony Gianfrancesco
Defendant-Appellant

NO. 38681

ENTRY

On written motion by counsel for appellant for a stay of execution of the judgment in the above case and having expressed his intention to perfect an appeal to The Supreme Court of the United States, it is ordered and adjudged therefore;

That execution of the judgment be, and the same hereby is, stayed until August 4, 1964, to enable appellant to apply to The Supreme Court of the United States for a stay of execution.

/s/ Kingsley Taft
KINGSLEY TAFT, CHIEF JUSTICE

I, THOMAS L. STARTZMAN, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No. 64, page 21.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 16th day of July, 1964.

Thomas L. Startzman, Clerk
By /s/ Norman L. Myers, Deputy

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO City of Columbus	1964 TERM Wednesday, July 1, 1964
State of Ohio Plaintiff-Appellee vs. Anthony Gianfrancesco Defendant-Appellant	NO. 38681 REHEARING

It is ordered by the Court that rehearing in this case is denied.

I, THOMAS L. STARTZMAN, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No. 46, Page 489.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 28th day of July, 1964.

Thomas L. Startzman, Clerk
By /s/ Norman L. Myers, Deputy

APPENDIX C

CROSS EXAMINATION OF OFFICER DAN MAGGIANETTI, JR.

Record. Page 43

Q. "You were there, Chief, from the time the surveillance operation or stakeout began?"

A. "That's right."

Q. "Until it was concluded, weren't you?"

A. "That's right."

Q. "You wouldn't leave an investigation of this size and importance in the middle, would you?"

A. "No Sir."

Q. "You were there from the start to the finish?"

A. "That's right."

Q. "And you were in complete charge from start to finish?"

A. "That's right."

Q. "I am asking you how much time, in your judgment, from the time Gianfrancesco was arrested until the time Economous was arrested?"

A. "That, I can't tell you exactly."

Q. "What is your best judgment?"

A. "Oh, I would say twenty or twenty-five minutes."

Record. Pages 44-45.

Q. "From the 1st to the 5th, inclusive, is a period of five days?"

A. "1st, 2nd, 4th, and 5th."

Q. "From the 1st to the 5th—from the time you commenced your operation or your surveillance, to the time of the arrest, five days elapsed?"

A. "That's right."

Q. "At any time during that five days, did you talk to any judge or magistrate about procuring a search warrant?"

A. "No, I didn't."

Q. "At any time during that five day period, did you talk to any Judge, Common Pleas Judge, Court of Appeals

Judge, County Court Judge, any mayor or magistrate, or any clerk in Trumbull County concerning the issuance of a warrant for the arrest of any of the men whom you had observed, in or about the North Side Hospital?"

A. "I did not."

Q. "You didn't get a warrant for a search for a person, or a warrant of search?"

A. "I did not."

CROSS EXAMINATION OF OFFICER PETER BUNYOFF

Record. Pages 169-170.

Q. "Well, Officer, of course, you know more about police terminology than I do, but when you pat a man down, you are looking for a weapon, and you are putting your hands on his person?"

A. "Yes sir."

Q. "And you are exploring his pockets?"

A. "No sir, I didn't."

Q. "You were patting his pockets?"

A. "Exploring and patting is different, sir."

Q. "At any rate, you are patting the man's body?"

A. "Yes sir."

Q. "Feeling under his armpits?"

A. "Yes sir."

Q. "Around his waist—around his belt?"

A. "Are you talking about this particular incident?"

BY MR. NYBELL: "I'LL WITHDRAW THE QUESTION."

Q. "At any rate, when you patted Gianfrancesco down, you didn't feel any bundle of money in his pockets, did you?"

A. "No sir."

Q. "And you didn't find any knife, did you?"

A. "No sir."

Q. "And you didn't find any gun, did you?"

A. "No sir. I had the shot gun in my hand. I could only pat him down with one hand."

Q. "On his person, you didn't find a knife, gun, or black jack, or a weapon of any description whatsoever?"

A. "No weapon I didn't find."

Q. "In the course of this patting down, you didn't feel anything that felt like a bundle of money?"

A. "I can't say that I did."

CROSS EXAMINATION OF OFFICER FRANCIS J. GALLAGHER

Record. Pages 186-187.

Q. "You didn't search the defendant or observe him being searched?"

A. "He was searched at the scene, and he was searched by the turnkeys in front of me upon being booked at the jail."

Q. "When he was searched in front of the turnkeys at the jail, nothing was found in his pockets as determined evidentiary?"

A. "Little amount of money."

Q. "All right. A Wallet?"

A. "I don't have the list. I would imagine."

Q. "There was nothing unusual found in his pockets in this search at the Police Station?"

A. "No sir."

Q. "There was no numbers slips or slips that may have been numbers slips found on his person at the scene that you witnessed?"

A. "No, I didn't see them take anything from him."

Q. "And those items, identified 19 through 22, were found on the front seat of Gianfrancesco's car, you don't know who put them there?"

A. "No, I was away from the car."

DIRECT EXAMINATION OF OFFICER ROBERT R. ZINS

Record. 191-192

Q "I see, and back on October 5, 1962, you were with the Intelligence and Security Division?"

A. "That's correct."

Q. "On October 5, 1962, were you out there at the North Side Hospital?"

A. "Yes, I was."

Q. "Would you tell us what role you played in that arrest in that raid?"

A. "Officer Donald Komara, Sam Vitt, and myself were stationed in an unmarked police car in the Nurses' driveway. That is just west of the circle in the hospital exit. When we got the word over the radio from Dan Maggianetti, we closed in, and I approached the exit of the driveway near Gypsy Lane and, at that time, Officer Gallagher had just pulled in front of R. J. Manuel's car—I believe that he is the owner of the car."

Q. "Yes."

A. "And the two subjects were getting out of the car. I handcuffed Manuel and took him over to where Gianfrancesco and Joe Mosco were standing."

Q. "Then after that, what happened?"

A. "We escorted all four of the subjects back to the unmarked car, where I guarded them. Donald Komara was with me. We escorted them back and left for the other phase of the operation."

Q. "After that, you stood guard on the subjects over here in the parking lot, is that right?"

A. "That's correct."

Q. "And that was your participation in that raid?"

A. "That's correct."

BY MR. GRIFFITH: "NO FURTHER QUESTIONS."

CROSS EXAMINATION OF OFFICER ROBERT R. ZINS.

Record. Pages 193-195

Q. "And it appears as though the Nurses' quarters are to the west of the central hospital area, is that correct?"

A. "That's correct."

Q. "So that between the driveway in front of the central hospital area and the Nurses' quarters, there appears to be a border of heavy shrubs and bushes of some type?"

A. "That's right. It is especially thick toward the hospital, but when you get to Gypsy Lane, it thins out."

Q. "Now, were you, Komara, and Vitt, parked in front of the Nurses' quarters?"

A. "Officer Vitt and myself were inside the car, and Komara was in the bushes near the hospital."

Q. "Was the car itself over here in this semi-circular driveway in front of the Nurses' quarters?"

A. "Yes, it was."

Q. "So that it would be difficult, if not impossible for you to see the flow of traffic and the movement inside the perimeter of that border of shrubs and bushes, is that right, Officer?"

A. "Yes, it is."

Q. "So this—from where you and Vitt were parked in front of the Nurses' quarters, you couldn't see Gianfrancesco's car?"

A. "That's correct, we could not."

Q. "And you couldn't see Mosco's car?"

A. "No."

Q. "Is that correct?"

A. "That's correct."

CROSS EXAMINATION OF OFFICER DONALD KOMARA

Record. Page 211

Q. "When you first saw them, they were all where?"

A. "In the street."

Q. "In the street, and this search that you made of Gianfrancesco's car was that made at the scene? I mean while the car was parked in the driveway of the North Side Hospital parking lot?"

A. "Yes, that is where it was made."

Q. "Was Mr. Gianfrancesco present when his car was searched?"

A. "No."

Q. "Was this after he had been taken to the station?"

A. "No."

Q. "About how far—where was Mr. Gianfrancesco at when you were searching his car?"

A. "He was in car 66, which was in the next driveway—the driveway of the Nurses' Home."

DIRECT EXAMINATION OF OFFICER THOMAS KELTY

Record. Pages 269-272

Q. "All right. Handing you State's Exhibit 27, can you identify those?"

BY MR. NYBELL: "SAME OBJECTION, YOUR HONOR."

BY THE COURT: "OVERRULED."

A. "These are number slips."

Q. "Handing you State's Exhibit 21, can you identify that?"

A. "These are number slips."

BY THE COURT: "I WOULD LIKE TO ASK A QUESTION. I WANT TO KNOW IF YOU WILL IDENTIFY THE SLIPS FOUND IN THE CAR ON GOLETA AVE."

BY MR. NYBELL: "SOME OF THESE ARE BOSTIC'S SLIPS."

BY THE COURT: "I WOULD LIKE TO KNOW THE ONES THAT WERE FOUND OVER ON GOLETA AVE.? WHAT EXHIBIT IS THAT, PLEASE?"

BY MR. GRIFFITH: "THAT IS STATE'S EXHIBIT 27."

BY THE COURT: "HAVE YOU IDENTIFIED THAT AND STATED WHAT IS IN THAT?"

A. "I believe I have, yes sir."

BY THE COURT: "MEMBERS OF THE JURY, I AM SUSTAINING THE OBJECTION OF COUNSEL FOR THE DEFENDANT IN RESPECT TO THE OFFICER

STATING WHAT IS IN THE EXHIBIT FOUND IN THE CAR ON GOLETA AVENUE FOR THE REASON THAT, IN THE COURT'S OPINION, IS SOME DISTANCE AWAY FROM THE GIANFRANCESCO CAR, AND THE JURY WILL DISREGARD THAT TESTIMONY. THE REST OF THE TESTIMONY IN REGARD TO THE EXHIBITS MAY REMAIN. NOW, MR. NYBELL, YOU WANTED TO SAY SOMETHING?"

BY MR. NYBELL. "THE SAME OBJECTION IS ADDRESSED TO STATE'S EXHIBITS EMBRACING THE SLIPS AND SO FORTH THAT WERE FOUND ON R. J. MANUEL ON OCTOBER 5TH. THERE IS ABSOLUTELY NO EVIDENCE IN THE RECORD—IN FACT, THE EVIDENCE IS ALL TO THE CONTRARY, THAT THE DEFENDANT WAS NEVER AT OR ABOUT OR NEAR THE MANUEL CAR THE DATE THESE ITEMS WERE SEIZED, THEIR ONLY EFFECT BEING TO INCITE PREJUDICE AND INCITE THE PASSION OF THE JURY AND TO ATTEMPT TO INUNDATE THIS DEFENDANT BY DRAGGING IN A HOST OF TOTALLY UNRELATED MATTER, AND I CONSIDER THAT IS HIGHLY PREJUDICIAL."

BY THE COURT: "I PARTLY AGREE WITH COUNSEL FOR THE DEFENDANT. THE CAR ON GOLETA AVENUE IS REMOTE FROM THE GIANFRANCESCO CAR. I AM GOING TO SUSTAIN THE OBJECTION TO THAT EXHIBIT—EXHIBIT 27. THE OTHERS, BEING IN THE IMMEDIATE AREA, I THINK ARE PROPER."

Q. "Can you tell us what those are?"

BY MR. NYBELL: "REFERRING TO WHAT EXHIBIT?"

Q. "Referring to State's Exhibit 24. Can you tell us in a general way what those are?"

A. "This would indicate the number that hit on the stocks and the races in the month of July."

BY MR. GRIFFITH: "I HAVE NO FURTHER QUESTIONS."

CROSS EXAMINATION OF OFFICER THOMAS KELTY

Record. Page 279

Q. "And you weren't present when he was searched at the station on October 5th?"

A. "No sir."

Q. "But do you know that no numbers slips were found on his person? Have you learned that?"

A. "I learned there was no number slips found on his person."

CROSS EXAMINATION OF ANTHONY GIANFRANCESCO

Record. Pages 366-367

Q. "Have you ever heard of a Federal Gambling Stamp?"

BY MR. NYBELL: "I OBJECT TO IT, YOUR HONOR."

BY THE COURT: "YOU MAY ANSWER THAT."

A. "Yes, I heard of it."

Q. "And what are those used for?"

BY MR. NYBELL: "I OBJECT YOUR HONOR."

BY MR. GRIFFITH: "I WILL WITHDRAW THE QUESTION."

Q. "Do you possess a Federal Gambling Stamp?"

BY MR. NYBELL: "I OBJECT, YOUR HONOR."

BY THE COURT: "YOU MAY ANSWER THAT."

BY MR. GRIFFITH: "YOU MAY ANSWER THE QUESTION."

A. "Do I own one?"

Q. "Do you possess a Federal Gambling Stamp?"

A. "Yes, I bought one."

GENERAL CHARGE OF THE COURT

Record. Pages 382-384

"Members of counsel, is there any addition, correction, or omission in respect to the charge? You both have your exceptions to the general charge, of course."

BY MR. GRIFFITH: "I AM COMPLETELY SATISFIED."

BY MR. NYBELL: "THE DEFENDANT IS SATISFIED, YOUR HONOR."

"The jury may now retire to your jury room with the bailiff."

"Jury started to deliberate at 18 minutes to 4:00."

"At 5:35 o'clock P.M., Thursday, June 6, 1963, the following transpired in the Court Room:

BY THE COURT:

"Members of the jury, it is now twenty-five to six. Most everyone, I presume, is getting hungry. At least I eat early. Under the law, you will stay together and, strange as it may seem, you get a free dinner on the county. There are no special instructions. You understand, of course, while you are at dinner, do not discuss the case —any of you, and you will be in charge of the bailiff. Eat by yourselves, and I am going to send the two alternates along as long as they are staying for dinner. You understand you do not participate in the deliberations unless there is disability of some juror. Take your time, enjoy your meal, and when you get back, go to your jury room but do not discuss the case until everyone is present. Do not start the discussions until the twelve jurors are there.

"If you want to roam around for five minutes until I make the necessary arrangements. We will find some place around town where you will have a private dining room so if you will stay on the floor, we will round you up in a few minutes. We will proceed with the deliberations after you have had your dinner."

"Jury went to dinner at 5:45 o'clock P.M., and returned at 7:30 o'clock P.M., to deliberate further."

Office-Supreme Court, U.S.
FILED
NOV 7 1964
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1964.

No. 510.

ANTHONY GIANFRANCESCO,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

BRIEF OF RESPONDENT
In Opposition to Petition For Writ of Certiorari to The Supreme Court of Ohio.

CLYDE W. OSBORNE,
Prosecuting Attorney,
LOREN E. VAN BROCKLIN,
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In Opposition to Petition For Writ of Certiorari to The Supreme Court of Ohio.

CITATIONS TO OPINIONS BELOW.

The Court of Common Pleas (the trial court) of Mahoning County, Ohio issued no written opinion. The decision of the Court of Appeals, Seventh Judicial District, State of Ohio, sustaining the Trial Court, is unreported. Said Appellate Court issued a written opinion. (Appendix A, page 9.)

The Supreme Court of Ohio journalized their entries dismissing the appeal for the reason that no substantial constitutional question exists, and overruled the motion for leave to appeal. They did not write an Opinion. (Appendix A, page 14.)

CONSTITUTIONAL PROVISIONS INVOLVED.

Amendment IV.

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

Amendment XIV, Section 1.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

QUESTIONS PRESENTED.

(1) Whether the Trial Court violated the constitutional rights of the Petitioner, as protected by the IV. and the XIV Amendments of the Constitution of the United States, by failing to sustain a motion to suppress certain evidence which had been obtained as an incident of a lawful arrest of Petitioner without a warrant and a contemporaneous search of Petitioner's car at the time of said lawful arrest.

(2) Whether the Trial Court violated the constitutional rights of the Petitioner as protected by the XIV Amendment of the Constitution of the United States by inquiring of the jury whether or not there was a reasonable chance of reaching a verdict.

STATUTES INVOLVED.

Ohio Revised Code Section 1.06, see Appendix B, page 16; Ohio Revised Code Section 2915.13, see Appendix B, page 16; Ohio Revised Code Section 2935.03 see Appendix B, page 16; Ohio Revised Code Section 2935.04, see Appendix B, page 17.

STATEMENT.

The Petitioner, Anthony Gianfrancesco, was indicted by the Grand Jury of Mahoning County, Ohio. The indictment charged the Petitioner with a violation of Ohio Revised Code Section 2915.13 (Promoting A Numbers Game), see Appendix B, page 16. Prior to the trial, Petitioner filed a motion to suppress the evidence. After hearing said motion was overruled by the Trial Court.

The Record discloses that on August 17, 1962, two officers of the Youngstown Police Department approached the parking lot adjacent to the Atlantic Mills Discount Store on Belmont Avenue in the city of Youngstown, Ohio. The Record further discloses that as the officers approached the parking lot they saw Petitioner seated in a 1958 Buick automobile. The Buick car was parked about two aisles from where they pulled in to the lot. The police car was operated by officers Francis Gallagher and Robert R. Zins. These officers were acquainted with the Petitioner (R. 14, ll. 7-13, Appendix C, page 17.) Officer Zins told Officer Gallagher to stop the police car and he alighted from the police car and approached the automobile in which the Petitioner was seated. As Officer Zins approached the vehicle in which Petitioner was seated, Petitioner was asked by Officer Zins what he was doing and what he had. Petitioner Gianfrancesco handed Officer Zins several numbers slips that the Officer had previously seen lying on the

front seat of the 1958 Buick automobile. (R. 15 and 16, Appendix C, page 17.) By that time Officer Gallagher was approaching Petitioner's car and the numbers slips were shown by Officer Zins to Officer Gallagher. Petitioner was immediately placed under arrest by the Officers and ordered to get out of the car. He was informed of his arrest and informed that the Officers were going to search his person and the car in his possession (R. 15-16, Appendix C, page 18.)

The Officers searched the person of Petitioner and his automobile. Numbers slips were found lying on the front seat. The Officers found slips underneath the front floor mat with twenty dollars in small change. Before Gianfrancesco got out of the car he attempted to stuff some rundown sheets and numbers slips between the crack of the front seat of the automobile. Petitioner was also in possession of tally sheets. (R. 20, ll. 7-8, Appendix C, page 21.)

The Petitioner was immediately taken by the officers to the Youngstown Police Department where an affidavit and warrant for arrest were immediately obtained. The evidence was initialed and tagged by the officers and placed in a secure locker in the police department. Under date of February 13, 1963, this case came on for trial before a jury. On February 14, 1963, the jury returned a verdict of guilty as charged in the indictment. Subsequent to the trial, Petitioner filed a motion for a new trial and an application for probation. Open court hearings were held on these motions and the trial Judge overruled both motions, and Petitioner was sentenced to a term of not less than one nor more than ten years in the Ohio State Penitentiary. The case was appealed to the Court of Appeals, Seventh Judicial District, Mahoning County, Ohio,

which affirmed the judgment of the Court of Common Pleas. The Supreme Court of Ohio at a later date affirmed the judgment of the Court of Appeals.

ARGUMENT.

Petitioner alleges in point I that the Trial Court erred in overruling defendant's motion to suppress the evidence. The Court's attention is directed to Ohio Revised Code Section 2935.03. (Appendix B, page 16.) It provides in relevant part that an officer without a warrant can arrest a person found violating a statute of the State of Ohio.

> "A sheriff, deputy sheriff, marshal, deputy marshal, watchman, or police officer shall arrest and detain a person found violating a law of this state, or an ordinance of a municipal corporation, until a warrant can be obtained."

Petitioner was arrested without a warrant, for what the arresting officers believed and had probable cause to believe was a commission of a felony in this state. Ohio Revised Code Section 2935.04 (Appendix B, page 17) prescribes under what circumstances an arrest may be made without a warrant.

Ohio Revised Code 2935.04:

> "When a felony has been committed, or there is reasonable ground to believe that a felony has been committed, any person without a warrant may arrest another whom he has reasonable cause to believe is guilty of the offense, and detain him until a warrant can be obtained."

The courts have uniformly held that the general rule is that an officer making a lawful arrest may search the person and the premises where he is arrested without a

search warrant, if such search is reasonably incident to such arrest. The Supreme Court of the United States has taken this position in the case of *Harris vs. The United States*, 331 U. S. 145; 91 L. Ed. 1399.

Petitioner puts great reliance on *Mapp vs. The State of Ohio*, 367 U. S. 643; 6 L. Ed. (2d) 1081, 81 Sup. Ct. 1684. It is brought to this court's attention that the *Mapp* case is certainly not in point in this matter. In the *Mapp* case there was an unlawful arrest and search made. The evidence discloses that as Officer Zins approached the car, he saw the numbers slips and these slips were handed to the officer by Petitioner at which time he was placed under arrest and the following search was an incident to and a part of the lawful arrest.

A recent case decided by the Supreme Court of Ohio reported as *State vs. Beck*, 175 O. S. 73 wherein the Court holds:

> "All searches and seizures without warrants are not prohibited by law. The search of an individual's person on the honest belief of an arresting officer, based upon probable cause that a felony has been committed, does not constitute an unlawful search and incriminating articles seized during the search may properly be received in evidence against the individual at his trial for having in his possession such articles."

In the case of *Ker vs. California*, cited at 374 U. S. 23, the Supreme Court of the United States held:

> "The doctrine that a search without warrant may be lawfully conducted as an incident to a lawful arrest has long been recognized as consistent with the Fourth Amendment's protection against unreasonable searches and seizures."

Certainly this search and seizure was made as an incident to a lawful arrest. It is submitted that point I is

not well taken. Petitioner makes a great point of trying to prove by a recitation of some of the evidence adduced upon cross-examination that the police officer was not an expert. Certainly this officer who is a college graduate is very familiar with the appearance of gambling slips and is competent to testify as to what he saw and observed at the time of the lawful arrest of the Petitioner.

Petitioner relies on the case of *Wong Sun et al. vs. The United States*, 371 U. S. 471. This case is not in point for the reason that reasonable grounds and probable cause do exist in the case at bar. In the instant case, the court below could reasonably infer and find that probable cause did exist and that a search without a warrant was lawfully conducted as an incident to a lawful arrest.

It is true that Petitioner was arrested without a warrant and a search conducted founded upon the proposition that the arresting officer believed and had probable cause to believe that a felony had been committed. The United States Supreme Court in the case of *Henry vs. United States*, 361 U. S. 98, 102, 4 L. Ed. 2d 134 said:

> "Probable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed."

A question of fact is presented in each case. The Youngstown Police Officer had good reason to believe that Gianfrancesco was regularly engaged in carrying on a scheme of chance involving policy tickets.

Petitioner alleges that the trial court committed error when the trial court called the jury into the courtroom during the course of deliberation to determine whether or not there was a reasonable chance of soon reaching a verdict. (R. 142, Appendix C, pages 22-23.) There is nothing whatsoever objectionable in the language used by the Court of Common Pleas. The Judge refrained from in-

dicating to the jury his opinion as to the guilt or innocence of the accused. He did not try to intimidate or coerce the jury in any degree. He did not in any manner force the jury to do anything at all. The jury reached its verdict on the evidence, and the Court, by making this inquiry, did not commit error. In the case of *Boyett vs. The United States*, 48 F. (2d) 482, the trial court indicated to the jury that they were not willing to follow his instructions. (Not so in this case.) The Court also inferred that there should "not be any great difficulty in arriving at a verdict." The trial court in the case at bar did not indicate to the jury that they were derelict in their duty and he did not indicate that he intended to keep them sequestered until they reached a verdict.

Certainly it can not be said that the judgment and finding of guilty in this case was contrary to law and against the manifest weight of evidence. In this case there was direct and positive proof of Petitioner's participation in the crime alleged. Numbers slips, tally sheets, and money were found in the possession of the Petitioner.

CONCLUSION.

For the reasons stated, it is respectfully submitted that the judgment of the court below should be sustained.

CLYDE W. OSBORNE,
Prosecuting Attorney,
LOREN E. VAN BROCKLIN,
Assistant Prosecuting Attorney,
Court House, Mahoning County,
Youngstown, Ohio,
Counsel for the State of Ohio.

APPENDIX A.

OPINION OF THE COURT OF APPEALS OF MAHONING COUNTY, OHIO.

(Dated: October 15, 1963.)

JONES, J.

Anthony Gianfrancesco was indicted by the Mahoning County, Ohio, Grand Jury, May Term 1962. He was charged with a violation of Revised Code Section 2915.13.

On the tenth day of December, 1962, counsel for Gianfrancesco filed a motion to suppress evidence, which was subsequently overruled by the trial court. The case went to trial and a jury on the fourteenth day of February, 1963, returned a verdict of guilty as charged in the indictment.

Subsequent to the trial defendant filed a motion for new trial and an application for probation. Both motion and application were overruled by the trial court, and Gianfrancesco was sentenced to a term of not less than one nor more than ten years in the State Penitentiary.

The matter is now before this Court on an appeal from the judgment of the Court of Common Pleas of Mahoning County, Ohio.

On the seventeenth day of August, 1962, at about 3:45 p.m. Gianfrancesco was seated in a 1957 Buick automobile in a parking lot adjacent to the Atlantic Mills Department Store on Belmont Avenue in the City of Youngstown, Ohio. At this time a police officer of the City of Youngstown approached the vehicle in which Gianfrancesco was seated. The officer requested that Gianfrancesco hand to him certain pieces of paper that were lying on the front seat of the automobile. The paper slips were numbers tickets. Gianfrancesco was then placed under arrest, and a search was made of the automobile. Num-

bers slips were found lying on the front seat, underneath the front floor mat, and tucked between the crack of the front seat of the automobile. Gianfrancesco was then taken by the officer to the Youngstown Police Department, where an affidavit and warrant for arrest were immediately obtained.

The first assignment of error charges that the trial court erred in overruling Gianfrancesco's motion to suppress evidence. This evidence, of course, was the slips and tally sheets obtained as the result of the search conducted in the Buick automobile at the parking lot.

Section 2915.13, Revised Code, states as follows:

> "No person shall establish, open, set on foot, carry on, promote, make, draw, or act as 'backer' or 'vendor' for or on account of a scheme of chance known as 'policy,' 'numbers game,' 'clearing house,' or by words or terms of similar import, located in or to be drawn, paid, or carried on within or without this state, or by any of such means sell or expose for sale anything of value.
>
> "Whoever violates this section shall be fined not less than five hundred nor more than one thousand dollars and imprisoned not less than one nor more than ten years."

It has been held that where the violation of a criminal statute carries a penalty of a substantial fine and imprisonment for a period of one or more years and the person convicted under the statute is sentenced to the penitentiary, his offense is classed as a felony. *Ex parte Thorpe*, 66 Ohio App. 128, 32 N. E. (2d) 571, affirmed, 137 Ohio St. 325, 30 N. E. (2d) 335.

Section 1.06, Revised Code, states as follows:

> "Offenses which may be punished by death or by imprisonment in the penitentiary are felonies; all other

offenses are misdemeanors. As used in the Revised Code 'minor offense' is synonymous with misdemeanor."

The Youngstown police officer had good reason to believe that Gianfrancesco was regularly engaged in carrying on a scheme of chance involving numbers tickets. The defendant was arrested, without a warrant, for what the arresting officer believed and had probable cause to believe was a commission of a felony. Section 2935.04, Revised Code, describes when an arrest may be made without a warrant, and reads as follows:

"When a felony has been committed, or there is a reasonable ground to believe that a felony has been committed, any person without a warrant may arrest another whom he has reasonable cause to believe is guilty of the offense, and detain him until a warrant can be obtained."

From the evidence it appears without question that the officer had probable cause for making the arrest.

The United States Supreme Court in the case of *Henry vs. United States*, 361 U. S. 98, 102, 4 L. Ed. (2d) 134, 80 S. Ct. 168, said:

"Probable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed."

A question of fact is presented in each case, and when the facts within the knowledge of the police officer are sufficient to cause a reasonable and prudent man to believe that a felony has been committed and that the accused has committed it, probable cause is present. *State of Ohio vs. Beck*, 175 Ohio St. 73.

A police officer is authorized, without a warrant, to

arrest a person found to be in violation of the law, although such police officer has no such previous knowledge of the fact, if such police officer acts bona fide and upon such information as induces an honest belief that the person arrested is in the act of violating the law. See *Porello vs. State of Ohio*, 121 Ohio St. 280.

The remaining question, as respects this assignment of error, is then: Should the evidence obtained following the lawful arrest be suppressed as being "unlawfully obtained"? We think not. Once again we turn to the *Beck* case where the court held that:

> "All searches and seizures without warrants are not prohibited by law. The search of an individual's person on the honest belief of an arresting officer, based upon probable cause that a felony has been committed, does not constitute an unlawful search, and incriminating articles seized during the search may properly be received in evidence against the individual at his trial for having in his possession such articles." *State vs. Beck*, 175 Ohio St. 73, Syllabus 1.

Coming now to the fifth assignment of error that the trial court erred in its supplemental charge to the jury. We are of the opinion that the giving to the jury of the definition of the word "promoting" was discretionary upon the trial court, and find no abuse thereof.

For the final assignment of error appellant argues that the court called the jury into the courtroom during the course of their deliberations to determine whether or not there was a reasonable chance of soon reaching a verdict. The trial court said:

> "The Court: You are hard-working jurors.
>
> "You will have to stay until you reach a verdict. So then I would ask you whether there is a reasonable chance of reaching a verdict. Who is your foreman?

"Jury Foreman: I am, Your Honor.

"The Court: What do you say?

"Jury Foreman: I wish I knew.

"The Court: Give you another half hour?

"Jury Foreman: We are closer to a verdict, but I don't know whether we will ever reach one, to tell you the truth.

"The Court: Well, why don't you go and try for another half hour and let the court know by the buzzer when you are ready and we will reconsider this matter at that time. All right. Thank you."

It is this language that appellant claims to be objectionable and prejudicial. We are unable to conclude that this language has such an obvious meaning one way or the other as to be objectionable.

As to the other errors assigned we find nothing contained therein to the prejudice of this defendant.

We are, therefore, of the opinion that the evidence properly justified the finding that Gianfrancesco was guilty as charged.

The judgment of the Court of Common Pleas is hereby affirmed.

BROWN, *P.J.*, Concurs.

FRANCE, *J.*, Concurs.

APPROVED:

GEORGE M. JONES,

Judge.

JOURNAL ENTRY OF THE COURT OF APPEALS OF MAHONING COUNTY, OHIO.

This cause came on for hearing upon the appeal on questions of law, assignments of error, bill of exceptions, the transcript, and the original papers and pleadings from the Court of Common Pleas of Mahoning County, Ohio, and was argued by counsel, the Court examined all of the claims of error, on consideration whereof the Court finds there is no error apparent on the record in said proceedings and judgment prejudicial to the Appellant.

It is, therefore, considered by the Court that the judgment of the Court of Common Pleas be, and the same is hereby affirmed.

It is further ordered that a special mandate be sent to the Common Pleas Court of Mahoning County, Ohio directing the Court of Common Pleas to carry this judgment into execution. To all of which, Appellant, by his counsel excepts.

ORDER OF THE SUPREME COURT OF OHIO DISMISSING APPEAL.

(March 18, 1964.)

This cause, here on appeal as of right from the Court of Appeals for Mahoning County was heard in the manner prescribed by law and upon motion of the appellee to dismiss such appeal.

On consideration thereof, such appeal is dismissed for the reason that no substantial constitutional question exists herein.

It is further ordered that the appellee recover from the appellant its costs herein expended; that a mandate be sent to the Court of Common Pleas to carry this judgment into

execution: and that a copy of this entry be certified to the Clerk of the Court of Appeals for Mahoning County for entry.

ORDER OF THE SUPREME COURT OF OHIO OVERRULING MOTION FOR LEAVE TO APPEAL.

(March 18, 1964.)

MOTION FOR LEAVE TO APPEAL FROM THE COURT OF APPEALS FOR MAHONING COUNTY.

It is ordered by the Court that this motion is overruled.

COSTS:

Motion Fee, $20.00, paid by Anthony Gianfrancesco.

ORDER OF THE SUPREME COURT OF OHIO DENYING REHEARING.

(April 22, 1964.)

It is ordered by the Court that rehearing in this case is denied.

APPENDIX B.

STATUTES.

Ohio Revised Code Section 1.06:

Offenses which may be punished by death or by imprisonment in the penitentiary are felonies; all other offenses are misdemeanors. As used in the Revised Code "minor offense" is synonymous with misdemeanor.

Ohio Revised Code Section 2915.13:

No person shall establish, open, set on foot, carry on, promote, make, draw, or act as "backer" or "vendor" for or on account of a scheme of chance known as "policy," "numbers game," "clearing house," or by words or terms of similar import, located in or to be drawn, paid, or carried on within or without this state, or by any of such means sell or expose for sale anything of value.

Whoever violates this section shall be fined not less than five hundred nor more than one thousand dollars and imprisoned not less than one nor more than ten years.

Ohio Revised Code Section 2935.03:

A sheriff, deputy sheriff, marshal, deputy marshal watchman, or police officer shall arrest and detain a person found violating a law of this state, or an ordinance of a municipal corporation, until a warrant can be obtained.

A constable within the limits of the township in which said constable has been appointed or elected, shall arrest and detain a person found by him in the commission of a misdemeanor, either in violation of a law of this state or an ordinance of a village, until a warrant can be obtained.

Ohio Revised Code Section 2935.04:

When a felony has been committed, or there is reasonable ground to believe that a felony has been committed, any person without a warrant may arrest another whom he has reasonable cause to believe is guilty of the offense, and detain him until a warrant can be obtained.

APPENDIX C.

Direct Examination of Officer Robert R. Zins.

By Mr. Van Brocklin.

Record 14, lines 7 through 12:

Q. When you approached that parking lot and you drove in what did you see, if anything?

A. I saw Mr. Gianfrancesco's car parked about two aisles up from us from where we pulled in.

Q. Were you acquainted with Gianfrancesco?

A. Yes, I was.

Record 15 and 16:

Q. Then as you approached this vehicle did you say anything to Gianfrancesco?

A. I asked him what he was doing there and I asked him what he had.

Q. What did he do, if anything?

A. He handed me the slips.

Q. He handed you the slips?

A. Yes, sir.

Q. What did you then do?

A. Well, by that time Officer Gallagher was approaching Gianfrancesco's car and I showed the slips to Officer Gallagher.

Q. Then did you do anything?

A. We placed him under arrest, and Officer Gallagher —well, we told Gianfrancesco to get out of the car.

Record 16, lines 17 through 22:

A. Well, we placed him under arrest first, and then we, Officer Gallagher searched him and I searched the car.

Q. When you searched the car what did you find?

A. In the crack of the seat there were some slips, and laying on this front seat there were some slips, and underneath the right floor mat was some $20 in change.

Record 16, lines 23 through 25:

Q. Now, Mr. Zins, I am going to hand to you what has been marked for identification purposes as State's Exhibit I (A) through (E). I now ask you to examine these slips and tell us whether or not you have ever seen them before?

Record 17:

A. Yes, sir. These were the slips that were laying on his front seat when I saw him when I first approached the car.

Q. What, if anything, was done with those slips?

A. Well, when I approached the car these were laying—the slips themselves were laying face down and the pad was laying face down also, and when I asked him what he had there, why he picked up the pad and handed it to me.

Q. Are there numbers on the reverse side of that pad?

A. Yes, sir, there are numbers on the reverse side, too.

Q. Are you familiar with what that is?

A. The numbers here?

Q. Yes.

A. Yes, sir.

Q. What are they?

A. Well, they are numbers taken off of the races and the stock market.

Q. Can you tell us whether or not those numbers are used in the numbers game?

A. Yes, sir.

Mr. Nybell: I object, Your Honor.

The Court: Sustained.

Q. How long were you assigned to the Intelligence Division of the police department?

A. One year.

Record page 18:

Q. In the course of your official employment did you have occasion to investigate the numbers game?

A. Yes, sir. That was the main objective.

Q. Are you familiar with what numbers slips look like?

A. Very.

Q. Have you made any arrests of people playing and selling this?

A. Yes, I have.

Q. Based on your experience as a policeman, can you now tell us whether or not those are numbers slips?

Mr. Nybell: I object, Your Honor.

The Court: Overruled.

Q. You may answer.

A. Yes. I could tell that they were number slips.

Q. I now ask you whether or not you did anything with those slips?

A. I marked them as evidence. I put my initial on them and dated them.

Q. What is your initial?

A. R. R. Z.

Q. And when did you initial those?

A. We brought them directly to the police department and I initialed them in the office of the Intelligence & Security Squad.

Record page 19:

Q. I now hand you what has been marked for identification purposes as State's Exhibit Number 2(A) through (SS), and I now ask you to open that package, and tell us whether or not you have ever seen them before?

A. These slips I found stuffed between the crack of the seat, between the back rest and the seat of his car.

Q. Of whose car?

A. Mr. Gianfrancesco's car.

Q. What, if anything,—withdraw that. I want you to leaf through those sheets and tell us whether or not you did anything with those bug slips.

A. I also marked these as evidence and dated them, each and everyone of them.

Q. Did Mr. Gallagher do anything?

A. Yes. His initials are directly below mine.

Record page 19:

Q. After you arrested Gianfrancesco what did you do with those slips?

A. Took them to the office of the Intelligence & Security Squad and locked them in the locker.

Q. Based on your experience as a policeman could you tell us what these papers in State's Exhibit Number 2 are?

A. Numbers slips.

Mr. Nybell: I object.

The Court: Objection overruled.

Record page 20:

Q. I now hand to you what has been marked for identification purposes as State's Exhibit Number 3 (A) through (L). I now ask you to examine those, tell us whether or not you have ever seen them before?

A. Yes, I have my initial on them also, and the date.

Q. Where did you see them before, sir?

A. These were found on the seat. Apparently Mr. Gianfrancesco was sitting on them or tried to stuff them in the crack.

Q. All right. Based on your experience as a policeman, can you tell us what those are?

Mr. Nybell: Objection.

The Court: Overruled.

A. These are also numbers slips. That is a tally sheet. These are totals. The individual number slip is the popular size here, and this, these have been taken from numerous numbers slips and added up.

Q. Those are what you would call run-down sheets?

A. Run down sheets.

Mr. Nybell: Objection.

Q. Is that right?

The Court: Overruled. Go ahead.

A. That is right. On this particular one it has stock, that was taken off the stock market.

Record page 21:

Q. Now, these numbers, if you know, sometimes are played on the stock market, the results that day, and sometimes on the race results?

A. That is correct.

Q. Did you examine all of those sheets, Mr. Zins?

A. This one here, it has on the right side, it has stock, and on the left hand side it has race and stock, "R & S."

Q. You also initial that sheet?

A. Yes, sir. They are all initialed.

Q. Have you examined those, sir?

A. I have.

Q. And where did you find these?

A. Those were laying on the front seat right by the crack of the seat.

Q. I am now going to hand you what has been marked for identification purposes as State's Exhibit Number 4. I now ask you whether or not you ever seen that money before?

A. This is the money that was taken out of the right hand—from underneath the right-hand floor mat in Mr. Gianfrancesco's car.

Q. Did you take it out yourself personally?

A. I did take it out, yes.

Q. What did you do with that money after you placed him under arrest?

Record page 142:

3:30 o'clock P. M.,

The Court: You are hard-working jurors. You will have to stay until you reach a verdict. So then I would ask you whether there is a reasonable chance of reaching a verdict. Who is your foreman?

Jury Foreman: I am, Your Honor.

The Court: What do you say?

Jury Foreman: I wish I knew.

The Court: Give you another half hour?

Jury Foreman: We are closer to a verdict, but I don't know whether we will ever reach one, to tell you the truth.

The Court: Well, why don't you go and try for another half hour and let the court know by the buzzer when you are ready and we will reconsider this matter at that time. All right. Thank you.

Office Supreme Court, U.S.
FILED
NOV 17 1964
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1964.

No. 542.

ANTHONY GIANFRANCESCO,

Petitioner,

vs.

THE STATE OF OHIO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO.

BRIEF FOR THE STATE OF OHIO IN OPPOSITION.

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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO.

BRIEF FOR THE STATE OF OHIO IN OPPOSITION.

OPINIONS BELOW.

There is no opinion of the trial court in this case, the opinion of the Court of Appeals, Seventh Judicial District, State of Ohio, is set out in Appendix A. This opinion was journalized as included in Petitioner's brief set out in Appendix B. The Supreme Court of Ohio issued no written opinion, but merely journalized their entry sustaining the Court below. These decisions are unreported.

JURISDICTION.

The jurisdiction of this Court is not properly invoked with respect to either the first question presented or the second question presented for the reason that the questions presented therein were not properly raised in the State Courts.

STATEMENT OF FACTS.

In September of 1962 the Youngstown Police received information that the parking lot of the North Side Hospital in Youngstown, Ohio was being used as a station for exchange of number slips and money by numbers operators. Acting upon this information, on October 1, 1962, Patrolman Harold Parker was assigned to make surveillance of any such activities from the roof of the North Side Hospital. This surveillance was carried on October 2nd, October 3rd and October 5th. Mr. Parker took with him binoculars as well as a camera with a telescopic lens. At about 3:30 in the afternoon on October 1st, Anthony Gianfrancesco drove into the parking lot and parked. He sat in his car counting white slips of paper. Shortly after his arrival, Joseph Mosco pulled into the parking lot, got out of his car, got into Mr. Gianfrancesco's car. The two of them would continue to count the slips and money in the Gianfrancesco auto. Shortly thereafter a third car pulled into the parking lot, Mr. Gianfrancesco got out of his car, went to the passenger side of the third car, received a brown paper bag and ran back to his own car. Mr. Mosco got out of the Gianfrancesco car, got into his own car and all subjects left. This same procedure was observed on the 2nd of October and on the 4th of October. This operation was viewed through binoculars and photographed through a telescopic lens camera and the photographs were admitted into evidence as State's Exhibits 2 through 12. The Buick with license number J1100B has been identified as the Gianfrancesco auto. The Ford with license number J1232W was identified as the Mosco auto and the Cadillac with license number J932X was the auto that Willie Baker arrived in.

After three days of surveillance and consultation with the Mahoning County Prosecutor's Office, it was decided to

close in on the operation on October 5, 1962. Two officers were stationed on the roof of the North Side Hospital at about 3:20 in the afternoon of October 5th, one with binoculars and the second one with a radio which could convey messages to the men on the ground. These men were Officers Parker and Maggianetti. On the ground in a private automobile of one of the police officers were Officers Friednamer, Gallagher and Bunyoff. These three officers were concealed in the automobile with a transistor receiver awaiting a signal from the officers on top of the hospital roof. Upon receiving such signal, Officers Bunyoff and Friednamer got out of the car and ran over past the Gianfrancesco automobile and into the drive area and placed Gianfrancesco and Mosco under arrest. Officer Gallagher pulled the automobile into the driveway of the North Side parking lot to block the attempted escape of Mr. Willie Baker and his driver, R. J. Manuel. Other officers arrived from concealment. In the Gianfrancesco car were the following items: money wrappers found on the front seat of the Gianfrancesco car marked State's Exhibit 19; $308.00 in currency marked State's Exhibit 20 also found in the front seat of the Gianfrancesco car; a bag full of number slips marked State's Exhibit 21 found in the front seat of the Gianfrancesco car; a large box with five green wrapped packages of number pads and six loose white pads of blank numbers pads marked State's Exhibit 23 and a little brown bag under the front seat containing $9.22 marked State's Exhibit 26. In the car in which Willie Baker was an occupant, in the front seat was found a paper bag containing 103 numbers slips which is identified as State's Exhibit 25. In the Mosco automobile were found 103 numbers slips which are marked State's Exhibit 1. Subsequently, after indictment, Manuel, Baker and Mosco all pleaded guilty in Trumbull County Common Pleas

Court to Promoting a Numbers Operation, were sentenced and have served out their sentences.

On April 18, 1963, this defendant was indicted by the Trumbull County Grand Jury for violation of Section 2915.13 charging that he did unlawfully carry on a scheme of chance known as policy, numbers game, or clearing house in violation of such section. The defendant pleaded not guilty and on June 4, 1963 trial was commenced. On June 6, 1963 the defendant was found guilty by the jury and sentenced to pay a fine of $500.00 and costs and sentenced to the Ohio Penitentiary for a period of one to ten years. Execution of sentence was suspended pending appeal.

On July 2nd, 1963, the defendant's motion for a new trial was overruled and an appeal was perfected to the Seventh District Court of Appeals assigning two Assignments of Error:

> 1. The Court erred in the admission of evidence contrary to law and in substantial violation of the Constitution and the laws of the State of Ohio.
>
> 2. The Judgment and finding of "guilty" is contrary to law and against the manifest weight of the evidence.

The first assignment of error in the Court of Appeals was based upon the allegation that the number slips found in other automobiles were not relevant. No question was raised as to the legality of the search which was being conducted at the time of the commission of a felony in the presence of these police officers, namely, the violation of Ohio Revised Code Section 2915.13 of which this defendant was found guilty. On consideration by the Seventh District Court of Appeals, the judgment of the trial court was affirmed.

Appeal was taken to the Ohio Supreme Court and

upon motion to dismiss the appeal was dismissed on July 13, 1964. In the assignment of errors to the Supreme Court of Ohio, three assignments were made.

1. The Court erred in failing to dismiss two alternate jurors when the cause was finally submitted and thereafter permitted said alternate jurors to accompany and fraternize with the jury who had been permitted to discontinue deliberations during the dinner hour which procedure was in violation of law and in violation of the constitutional rights of the defendant-appellant.

2. The court erred in failing to sustain defendant-appellant's motion at the close of the State's case and at the close of all the evidence.

3. The verdict of the jury and the judgment of the court was contrary to law and against the manifest weight of the evidence.

An application for rehearing was made and denied and this petition for writ of certiorari was thereupon submitted.

QUESTIONS PRESENTED.

(1) Did the determination by the trial court that number slips found in the auto of persons whom defendant was rendezvousing with were admissible in evidence constitute a violation of the constitutional rights of the defendant when no objection was made as to the legality of the search at either the time the search was made or at the time the evidence was submitted to the court?

(2) Were petitioner's rights under the Fourteenth Amendment of the Constitution violated when the trial court permitted the alternate jurors to remain on in stand-by status after the jury had commenced its deliberations and sent the alternate jurors to dinner with the other jurors in the custody of the bailiff after adequate instruction not to discuss this case?

ARGUMENT.

Referring first to the property of the admission of number slips obtained by police officers in searching the petitioner's car, the evidence was that there was a violation of a felony statute in progress at the time of this arrest and search of defendant's person and auto, namely, the violation of Ohio Revised Code Section 2915.13. The modus operandi of defendant and his accomplices had been observed for a three-day period. Number slips were observed by police officers from the roof of the hospital using high power binoculars. Number slips were observed by police officers as they approached and passed defendant's automobile and defendant was observed proceeding to make his contact as usual. This would appear to be a clear violation of Ohio Revised Code Section 2915.13. The jury in this case also reached the same conclusion.

Ohio Revised Code Section 2935.04 provides:

> "When a felony has been committed, or there is reasonable ground to believe that a felony has been committed, any person without a warrant may arrest another whom he has reasonable cause to believe is guilty of the offense, and detain him until a warrant can be obtained."

This procedure was followed. Arrests were made before any search was made.

After the arrest of defendant, both his person and his auto were searched. The search incident to a lawful arrest has long been recognized in Ohio as well as most jurisdictions as a proper exception of the requirement of a search warrant. (*Dunning vs. Cincinnati*, 21 O. N. P. N. S. 468, *U. S. vs. Pierce*, 124 F. Supp. 264 and cases set out at 82 *A. L. R.* 782.) And it has generally been held that this right extends to automobiles. (*Decker vs. State*, 113 O. S. 512) (*Houck vs. State*, 106 O. S. 195).

Recognizing this right of search incident to an arrest, no motion to suppress the evidence was ever filed, no objection as to the legality of the method of obtaining evidence was raised at the time the evidence was introduced, only as to its relevancy, nor was it raised in the appeal to the Court of Appeals of the Seventh District of the State of Ohio, or in the appeal to the Supreme Court of the State of Ohio or in its application for rehearing. This question is raised and considered by the Courts for the first time in the Supreme Court of the United States.

Rule 15 D of the Revised Rules of the Supreme Court of the United States requires an appeal that is from the State court to set out in the statement of the case the stage of the proceedings in the court of first instance and in the appellate court at which and in the manner in which the federal questions sought to be reviewed were raised, the methods of raising them, and the way in which they were passed upon by the Court with pertinent quotations at specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears that will support the assertion that the rulings of the court were of the nature to bring the case within the statutory provisions and believed to confer jurisdiction on this Court.

Rule 16 B of the Revised Rules of the Supreme Court provides:

> "The court will receive a motion to dismiss an appeal from a state court on the ground that it does not present a substantial federal question or that the federal question sought to be reviewed was not timely or properly raised or expressly passed on;"

The Ohio Courts have long held that the forum of the reviewing Court is not a place where for the first time a point which has not been deemed of essence at the trial

and which has not been seriously pressed to the attention of the Court is to be brought to the front for the mere chance purpose of securing a reversal of the judgment which the Court finds otherwise correct. (*Patterson v. State*, 96 O. S. 90, commented upon in 3 *O. J.* (2d) 40.) It is a well settled rule of Ohio Jurisprudence that a reviewing court in appeals on question of law will only consider such errors in the lower court as were preserved by objection, ruling or otherwise in that court. (3 *O. J.* (2d) 38 and cases cited thereunder.) Likewise where the constitutional question claimed to be involved in the case was not submitted to or decided by the Court of Appeals, the Ohio Supreme Court will not consider such question. (*Clarington vs. Althear*, 120 O. S. 608, and *Cuthbertson vs. State*, 106 O. S. 658.) This is a sound rule and a rule that does not leave the appellant remediless. The post conviction proceedings of habeus corpus and federal inquiry through the district courts is still available to this appellant, but it enables the lower courts to pass upon the issue before being presented to the United States Supreme Court.

In regards to the second question submitted, namely, whether the defendant's rights under the Fourteenth Amendment were abrogated by permitting the two alternate jurors to remain on on stand-by basis and join the other jurors at dinner after proper instructions not to discuss the case, there are two provisions of the Ohio Revised Code that become pertinent. One is Ohio Revised Code Section 2313.37 pertaining to alternate jurors which provides in part:

> "* * * Such additional or alternate juror shall be sworn and seated near the jury, with equal opportunity for seeing and hearing the proceedings and

shall attend at all times upon the trial with the jury and shall obey all orders and admonitions of the court to the jury, and when the jurors are ordered kept together in a criminal case, said alternate juror shall be kept with them. Such additional or alternate juror shall be liable as a regular juror for failure to attend the trial or to obey any order or admonition of the court to the jury, shall receive the same compensation as other jurors, and except as provided in this section shall be discharged upon the final submission of the case to the jury."

Ohio Revised Code Section 2945.29 which is the criminal section pertaining to jurors, provides:

"If, before the conclusion of the *trial*, a juror becomes sick, or for other reason is unable to perform his duty, the court may order him to be discharged. In that case, if alternate jurors have been selected, one of them shall be designated to take the place of the juror so discharged."

The Supreme Court of Ohio, speaking through Judge Allen, in *Thomas vs. Mills,* 117 O. S. 119, has defined the word "trial" as follows:

"In its strict definition, the 'trial' in a criminal procedure means the proceedings in open court, after the pleadings are finished and the prosecution is otherwise ready, down to and including the rendition of the verdict."

This definition is cited in *Black's Law Dictionary.* Considering Ohio Revised Code Section 2945.29 and the definition of "trial" as given by the Ohio Supreme Court, it would appear that the right to substitute the alternate juror for a regular juror would continue on even after deliberations had commenced and this rule prevails in some states. (*People vs. Lanigan,* 140 P. (2d) 24, this be-

ing the rule in California.) However, the question of whether the court had a right to substitute jurors after deliberations began, does not need to be decided in this instance as there was no substitution after deliberations began. I only point this right of the court out to show that there was good cause for retaining the alternate jurors.

The rule pertaining to the dismissal of alternate jurors is clearly procedural and not mandatory. This has been specifically held in other procedural matters pertaining to juries as set at 50 *C. J. S.*, page 1083, citing *State vs. Jefferson*, 34 A. (2d) 881, wherein it was held:

> "The direction of the statute providing that after the court's charge, twelve jurors shall be drawn from the fourteen sworn, is procedural and not mandatory."

And most important of all is the fact that at no time when this procedure was followed, did the defendant object, nor was this raised in the Court of Appeals when presented to that Court. This would appear to be the same situation as presented to the Ohio Supreme Court in the case of *Hanlon vs. The McAlpin Company*, 175 O. S. 517, decided March 4, 1964, by this Court. The Court in that case speaking through Judge O'Neill stated, and correctly so, that "the trial court and the Court of Appeals had jurisdiction of the subject matter in this action and the parties thereto, and under these circumstances this Court will not consider or determine claimed errors which were not raised in either the trial court or in the Court of Appeals." (Citing *Babcock vs. Perkins*, 165 O. S. 185.)

Last but not least in regards to this matter, there is not one thing in the record any place to indicate that these jurors and the bailiff and the alternates did anything other than observe the instructions of the court which were:

"You understand of course while you are at dinner, do not discuss the case, any of you, and you will be in charge of the bailiff. Eat by yourselves and I am going to send the two alternates along as they are staying for dinner. You understand you do not participate in the deliberations unless there is disability of some juror."

The former was directed to the jury and the latter comment:

"You understand you do not participate in the deliberations unless there is disability of some juror."

would most clearly appear to be directed to the alternate jurors.

With respect to this complaint, it is apparent that there is nothing inherently unfair, illegal or improper about permitting alternate jurors to remain on until the trial is completed. This issue was heard and decided in this case by the Ohio Supreme Court which apparently found that Ohio Revised Code Section 2313.37 was not mandatory but directory and the apparent conflict with that section and Ohio Revised Code Section 2945.29 permitted the jurors to remain on on a stand-by basis until the trial was completed which is that stage at which the verdict is rendered.

The defendant does not indicate in what way he may have been prejudiced by the practice complained of, and as a matter of fact, the record clearly indicates a lack of prejudice to the defendant. In no event can the propriety of such procedure be considered to be raised to the level of a constitutional question under the due process clause of the Fourteenth Amendment.

CONCLUSION.

It is respectfully submitted that the petition for a writ of certiorari in this case should be denied for the reason that it presents no substantial question involving a denial of petitioner's federal constitutional rights and the questions were not timely raised in the lower courts.

Respectfully submitted,

LYNN B. GRIFFITH, JR.,
Prosecuting Attorney in and for Trumbull County, Ohio.

APPENDIX A.

Statutes.

O. R. C. Section 2915.13—Penalty for promoting a "numbers game."

No person shall establish, open, set on foot, carry on, promote, make, draw, or act as "backer" or "vendor" for or on account of a scheme of chance known as "policy," "numbers game," "clearing house," or by words or terms of similar import, located in or to be drawn, paid, or carried on within or without this state, or by any of such means sell or expose for sale anything of value.

Whoever violates this section shall be fined not less than five hundred nor more than one thousand dollars and imprisoned not less than one nor more than ten years.

O. R. C. Section 2935.04—Point I—When any person may arrest.

When a felony has been committed, or there is reasonable ground to believe that a felony has been committed, any person without a warrant may arrest another whom he has reasonable cause to believe is guilty of the offense, and detain him until a warrant can be obtained.

O. R. C. Section 2945.29—Point II—Jurors becoming unable to perform duties.

If, before the conclusion of the trial, a juror becomes sick, or for other reason is unable to perform his duty, the court may order him to be discharged. In that case, if alternate jurors have been selected, one of them shall be designated to take the place of the juror so discharged. If after all alternate jurors have been made regular jurors, a juror becomes too incapacitated to perform his duty, and has been discharged by the court, a new juror may be

sworn and the trial begin anew, or the jury may be discharged and a new jury then or thereafter impaneled.

O. R. C. Section 2313.37—Duties of Alternate Juror. Point II.

In the trial in the court of common pleas of any case, civil or criminal, when it appears to the judge presiding that the trial is likely to be protracted, upon direction of the judge after the jury has been impaneled and sworn, an additional or alternate juror shall be selected in the same manner as the regular jurors in said case were selected but each party is entitled to two peremptory challenges as to such alternate juror. Such additional or alternate juror shall be sworn and seated near the jury, with equal opportunity for seeing and hearing the proceedings and shall attend at all times upon the trial with the jury and shall obey all orders and admonitions of the court to the jury, and when the jurors are ordered kept together in a criminal case, said alternate juror shall be kept with them. Such additional or alternate juror shall be liable as a regular juror for failure to attend the trial or to obey any order or admonition of the court to the jury, shall receive the same compensation as other jurors, and except as provided in this section shall be discharged upon the final submission of the case to the jury. If before the final submission of the case to the jury a juror becomes incapacitated or disqualified he may be discharged by the judge, in which case, or if a juror dies, upon the order of the judge, said additional or alternate juror shall become one of the jury and serve in all respects as though selected as an original juror.

APPENDIX B.

Opinion of the Court of Appeals of Trumbull County, Ohio.

FRANCE, J. of the Seventh District Court of Appeals

This appeal is from sentence of defendant, following jury verdict of guilty by the Court of Common Pleas, Trumbull County, on a charge of setting on foot or carrying on a scheme of chance known as a numbers game.

The arrest which resulted in indictment and trial, came about as a result of an unusual opportunity accorded to the Youngstown Police Department to study and record the activities of numbers or "bug" operators at a transfer station of the racket. Receiving information that the parking lot of the North Side Hospital (physically located in Trumbull County) was being used as this station, the police stationed an officer on the hospital roof with binoculars and camera with a telephoto lens. For a period of three days this officer watched the movements of defendant and others, including their actions, in transferring brown paper bags and in counting green and white slips of paper. He also made careful note of the timing of the operation.

Acting on this study, the trap was sprung on October 5, 1962. As defendant and others commenced to perform movements virtually identical with those previously observed, officers emerged from concealment in cars and shrubbery, blocked the exit, surrounded and arrested defendant and three others, and scooped up quantities of evidence including filled out "bug slips," a supply of blank slips, money including a quantity of small coins and coin wrappers. Immediately after arresting defendant and the others, one of the officers drove an arrestee's car over a previously observed route and scooped up other persons who followed a previously observed pattern of behavior with regard to it.

The three others, arrested with defendant, pleaded guilty to participation in a numbers operation, had served their sentences, and were used by the state as witnesses.

Two errors are assigned, the first of which relates to the admission of certain items of evidence over defendant's objection.

The first item claimed to be improperly admitted was a brown paper bag containing 103 slips identified as bug slips found in the front seat of an automobile in possession of an R. J. Manuel and parked close to defendant's car. It is claimed that there was nothing to connect this bag with defendant. Absent the testimony and pictures of the officer stationed on the hospital roof on previous days, this is true. But the testimony of this officer as to the repeated transfer of similar bags between the same people and the same cars on three previous days, establishes a pattern on which a jury not only could but, if they believed the testimony, should find that the bag and its contents were intended to be handled by defendant and that defendant fully expected to receive the bag in question on that day, and that he was prevented from doing so only by the early arrest of all concerned. The exhibit was properly admitted into evidence.

The second item of evidence of which defendant complains is an admission by defendant, on cross-examination, that he had purchased a Federal Gambling Stamp for the current year. In *State v. Curry,* 92 Ohio App. 1, admission of such evidence in chief is approved despite objection, based on public policy, that the use of such evidence will seriously disrupt the application of, and impair voluntary compliance with, a federal taxing statute.

In this case we are not concerned with the use of such evidence to establish the body of the crime. Defendant took the stand in his own behalf and offered evidence, not only that his gambling days were over, that admitted

previous convictions for participation in the "bug" were either long past, framed by numbers operators with his knowledge to protect someone else or sincerely repented of, but that in the recent past he had been a hard working, law abiding citizen presumably without interest or participation in gambling. Without prolonged discussion of the merits of using Gambling Stamp ownership in proof of gambling as a crime, we think it perfectly proper to use the fact of such ownership for impeachment purposes when a defendant, *as a witness*, puts his character and his eschewal of gambling activities in issue.

The first assignment of error is not well made.

The second assignment relates to the weight of the evidence and, in effect, argues that the jury was bound to accept defendant's story in explanation of his presence and receipt of money in small amounts at the spot on successive days. This far-fetched explanation was one for the jury to believe or disbelieve. They obviously chose to disbelieve it and, on reading this story in cold typescript, we agree that they could scarcely do otherwise.

We have studied the voluminous bill of exceptions and the mountain of exhibits with care and are impressed, not only with the wealth of competent and relevant evidence produced against defendant, but with the care with which his rights were safeguarded by an extremely able and conscientious trial judge.

We find no assignment of error well made. The judgment and sentence of the trial court is affirmed.

APPROVED:

JAMES G. FRANCE,
Judge.

JONES, J., Concurs.
BROWN, P. J., Concurs.

APPENDIX C.

Appellant's Assignment of Errors in the Supreme Court of Ohio.

1. The court erred in failing to dismiss two alternate jurors when the cause was finally submitted, and thereafter permitted said alternate jurors to accompany and fraternize with the jury who had been permitted to discontinue deliberations during the dinner hour, which procedure was in violation of law and in violation of the constitutional rights of the defendant-appellant.

2. The court erred in failing to sustain defendant-appellant's motion at the close of the State's case and at the close of all the evidence.

3. The verdict of the jury and the judgment of the court was contrary to law and against the manifest weight of the evidence.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

Nos. 510 and 542

ANTHONY GIANFRANCESCO, *Petitioner*,

v.

STATE OF OHIO, *Respondent*.

PETITION FOR REHEARING OF THE ORDER DENYING PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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Petitioner, Anthony Gianfrancesco, respectfully prays that, pursuant to Rule 58.2 and Rule 19.1(a) of the Revised Rules of this Court, a rehearing be granted to the order of this Court, entered in this case on December 7, 1963, denying the two petitions for a writ of certiorari to the Supreme Court of the State of Ohio in the above-captioned cases.

On December 29, 1964, the petitioner presented to Mr. Justice Potter Stewart an application for an extension of time to file a petition for rehearing in these two cases and, on that date, Mr. Justice Stewart granted an extension to and including January 30, 1965.

The petitioner respectfully shows as follows:

Subsequent to this Court's denial of the petition for a writ of certiorari on December 7, 1964, the Supreme

Court of Ohio rendered, on December 23, 1964, a decision which is in point in this case. In *The State of Ohio, Appellee* v. *Bernius, Appellant*, No. 38588, 177 O.S. 155, the Supreme Court reversed the judgment of the trial court, the Common Pleas Court of Hamilton County, and discharged the defendant who had been convicted for possession or control of obscene photographs. Prior to trial, the defendant had filed a motion to suppress those photographs as evidence on the ground that, as stated by the Supreme Court, "they had been found only as the result of an unlawful and unreasonable search." That court held that the trial court "should have granted" the motion, and that "If it had, there would have been no evidence to support a conviction." In so holding, the court stated:

> "The Supreme Court of the United States has held that the Fourteenth Amendment to the Constitution of the United States *now* requires a state court to suppress any evidence, no matter how reliable, acquired as a result of an unreasonable search. This represents a departure from its previous decisions on this precise question. *Wolf* v. *Colorado* (1949), 338 U.S. 25, 93 L.Ed., 1782, 69 S.Ct., 1359. See dissenting opinion, *Mapp* v. *Ohio* (1961), 367 U.S., 643, 672, 6 L.Ed. (2d), 1081, 1100, 81 S.Ct., 1684, 1701. However much the writer may disagree with the most recent holding of the Supreme Court on this question or question its wisdom or soundness (see 50 American Bar Association Journal, 815), we are required to follow it just as we followed its previous holding on the same question. See *State* v. *Mapp*, 170 Ohio St., 427, 166 N.E. (2d), 387."

The Supreme Court of Ohio held that the search of the automobile "cannot be justified as incident to a

lawful arrest. *Preston* v. *United States* (1964), 376 U.S. 364." The Supreme Court also held:

> "Our conclusion is that decisions of the Supreme Court of the United States require this court to hold that, where the owner of an automobile entrusts the possession and control thereof to another, a search thereof with the consent of the one so entrusted but without the express consent or authorization of such owner is, as against such owner, prohibited by the Fourteenth Amendment to the Constitution of the United States as an unreasonable search."

There is no evidence in the record of either of the two principal cases under consideration that the petitioner, who was the owner of the car searched in the two cases, gave "express consent or authorization" for such search. The respondent might endeavor to distinguish the *Bernius* case on the ground that the automobile in that case had been entrusted to the possession and control of another who had been driving the car. It is submitted, however, that the crux of the statement just quoted is that the search was made "without the express consent or authorization" of the owner of the car. It should be noted also that, at the time of the search of the car in the *Bernius* case, the driver was neither in possession nor in control of the car, since the search was made at the police station after the driver had given the keys to the automobile to the police.

The Supreme Court of Ohio pointed out that since the defendant had entrusted the automobile to another person, a Miss Young, "it might reasonably be argued that the defendant had apparently authorized Miss

Young to consent to a search of his automobile." In discarding this argument, that Court stated:

> "However, the opinion of Mr. Justice Stewart in *Stoner* v. *California* (1964), 376 U.S., 483, 11 L.Ed. (2d), 856, 860, 84 S. Ct., 889, 892, clearly indicates that, in providing 'procedural protections * * * to those charged with crime,' a state court can give no consideration to the law of agency as developed by its decisions. Thus, he states:
>
> "' Our decisions make clear that the rights protected by the Fourth Amendment are not to be eroded by strained applications of the law of agency or by unrealistic doctrines of "apparent authority." As this court has said, "it is unnecessary and ill-advised to import into the law surrounding the constitutional right to be free from unreasonable searches and seizures subtle distinctions, developed and refined by the common law in evolving the body of private property law which, more than almost any other branch of law, has been shaped by distinctions whose validity is largely historical * * * [W]e ought not to bow to them in the fair administration of the criminal law. To do so would not comport with our justly proud claim of the procedural protections accorded to those charged with crime." * * *.' "

With respect to any possible contention by the State that the *Bernius* case should be distinguished because the petitioner, rather than another person, was driving the car, it might also be pointed out that in the case Docket No. 542, the petitioner was not present when his car was searched. Officer Komara, testifying for the State, stated:

> "Q. 'Was Mr. Gianfrancesco *present when his car was searched?*' (emphasis supplied).
> "A. 'No.' " (Record, p. 211).

No number slips were found on the person of the defendant. Officer Kelty, testifying for the State, said:

> "A. 'I learned there was no number slips found on his person.'" (Record, p. 279).

There was not a scintilla of evidence that the petitioner had given any consent or authorization to the police to search his car.

The police had no search warrant in either of the two principal cases.

The State might contend that the search may be justified as an incident to a lawful arrest. It is submitted that there was no lawful arrest in either case. In case Docket No. 542, preparations for the arrest had, as shown by the evidence, been going on for days and the police had plenty of time to obtain a search warrant. Officer Maggianetti, Jr., testifying for the State, said:

> "Q. 'From the 1st to the 5th—from the time you commenced your operation or your surveillance, to the time of the arrest, five days elapsed?'
> "A. 'That's right.'
> "Q. 'At any time during that five days, did you talk to any judge or magistrate about procuring a search warrant?'
> "A. 'No, I didn't.'" (Record, pp. 44-45).

In case Docket No. 510, there is the uncorroborated testimony of a police officer who testified for the State. There was no emergency that had given rise to the policeman's approaching the petitioner's car. If the officer had good reason to do so, it must have been because he had such good reason prior to the officer's stopping his car with a view to approaching the petitioner. In such a case, it is suggested that a warrant

for the arrest as well as search warrant could and should have been obtained. There was no proof that any activity indicating the writing of numbers or any emergency prevented the obtaining of a warrant.

With all due respect to the opinion of the Supreme Court of Ohio, it is submitted that it does not reflect or resolve the question of illegal search settled by the Supreme Court in the *Mapp* case in the light of the facts of the two principal cases nor does any decision of the lower court reveal any reflection or consideration of this decision.

It is submitted that this Court should not permit circumvention of the *Mapp* case by the methods pursued by the police in those two cases and should thus prevent the provisions of the Fourth Amendment from being "eroded."

In its Brief in case No. 510, p. 6, the respondent endeavors to distinguish that case from the *Mapp* case on the ground that, in the latter, "there was an unlawful arrest and search made" while, in the former, a police officer, Zins, "saw the numbers slips and there slips were *handed* to the officer by Petitioner." Zins was *the only* police officer who was *at the car* when, according to his testimony, he *saw* the slips and was handed them by the defendant. As no other person was there at the time *his* testimony is, of course, uncorroborated. There is an implied but nevertheless discrediting contradiction of this testimony—the only one as to any pertinent voluntary action on the part of the petitioner in either case—in the respondent's Brief itself. On page 4 thereof, it is stated: "Before Gianfrancesco got out of the car he *attempted to stuff* some rundown sheets and numbers slips between the crack of

the front seat of the automobile." (Emphasis supplied). Does it stand the test of logic to contend that a man who "*attempted*" to hide numbers slips from a police officer, would have; *just moments before* such attempt, *voluntarily handed* slips to the same police officer from whom he "attempted" to hide them? Does it stand the test of logic to contend that such a person, one who has already "*voluntarily handed*" numbers slips to a police officer would—after the milk had already been spilled by such handing of self-incriminating evidence—"attempt" to hide from the same officer numbers slips a moment later?

It is respectfully submitted that to permit the illegal search and arrest without either an arrest or a search warrant in these two cases, in the above quoted words of this Court quoted by Mr. Justice Stewart "would not comport with our justly proud claim of the procedural protections accorded to those charged with crime."

CONCLUSION

For the reasons set forth above and in the petition for a writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Supreme Court of the State of Ohio.

Respectfully submitted,

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Certificate of Counsel

Pursuant to Rule 58.1 of the Revised Rules of this Court, I, the undersigned, John Maktos, counsel for petitioner, Anthony Gianfrancesco, in the above-captioned case, certify that this petition for rehearing is presented to this Court in good faith and not for purposes of delay.

JOHN MAKTOS,
Counsel for Petitioner.